[HIGH COURT OF AUSTRALIA.]

HARDING . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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SYDNEY, *April* 18, 19, 20, 26.

Barton A.C.J., Isaacs, Gavan Duffy and Rich JJ.

Income Tax—Power of taxation—Subject of taxation—Percentage of value of land used for residence or enjoyment—Income from property—Income Tax Assessment Act 1915-1916 (*No.* 34 *of* 1915—*No.* 39 *of* 1916), *secs.* 3, 14 (*e*)—*Income Tax Acts* 1915 (*Nos.* 41 *and* 48 *of* 1915), *sec.* 4—*Income Tax Act* 1916 (*No.* 37 *of* 1916), *sec.* 4—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 55.

The *Income Tax Acts* of 1915 and 1916 do not, by reason of the incorporation therein of the provision in sec. 14 (*e*) of the *Income Tax Assessment Act* 1915-1916 that the income of any person shall include "five per centum of the capital value of land and improvements thereon owned and used or used rent free by the taxpayer for the purpose of residence or enjoyment and not for the purpose of profit or gain," deal with a subject of taxation other than income, and, therefore, are not invalid under sec. 55 of the Constitution as dealing with more than one subject of taxation.

The subject of sec. 14 (*e*) is "income derived from property" within the definition of that term in sec. 3 of the *Income Tax Assessment Act* 1915-1916, and is taxable accordingly under the *Income Tax Acts* of 1915 and 1916.

CASES STATED.

On an appeal by William Harding to the Supreme Court of New South Wales from an assessment of him by the Federal Commissioner of Taxation for income tax for the financial year 1915-1916, *Cullen* C.J. stated a case for the opinion of the High Court which was substantially as follows:—

1. This is an appeal from assessment of income tax for the financial year 1915-1916.

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2. The above-named appellant is a taxpayer under the *Income Tax Assessment Acts* 1915 and the *Income Tax Acts* 1915, and as such is liable to pay income tax upon income received by him during the said financial year.

3. The appellant duly made a return as required by the said Acts, and the respondent has assessed him for income tax for the said financial year and has included in such assessment, as taxable income of the appellant, and has claimed to be paid income tax upon five per centum of the capital value of certain land and improvements thereon owned and used by the appellant for the purpose of residence and enjoyment and not for the purpose of profit or gain. The said land is situate near Sydney in the State of New South Wales.

4. The appellant claims :—(*a*) That the said five per centum is not income and therefore cannot be included as a subject of taxation in the above-mentioned Acts as such Acts are laws imposing taxation upon income, and that the appellant is therefore not liable to pay income tax thereon. (*b*) That the said five per centum is not income derived in Australia or derived from a source within Australia, and therefore is not liable to be taxed under the said Acts. (*c*) Or, in the alternative, that if the said five per centum be income of the appellant he is entitled to deduct from his gross income all outgoings and expenses incurred by him in maintaining and repairing the said land and improvements, including in such outgoings and expenses sums paid or expended and costs incurred for manure, top-dressing lawns and wages paid for garden up-keep.

5. The respondent has disallowed the claims mentioned in par. 4 hereof, and the appellant by notice of objection duly objected to the said assessment, and by arrangement with the respondent it has been agreed that such notice of objection shall be treated as a notice of appeal pursuant to sec. 37 of the said *Income Tax Assessment Acts* 1915.

6. For the purposes of this case the said return, assessment and notice of objection are to be taken to be before the Court.

7. On the hearing of the appeal before me the following questions, which in my opinion are questions of law, have arisen, and at the

request of the parties I state this case for the opinion of the High Court.

The questions for the determination of the High Court are :—

(1) Is sub-sec. (*e*) of sec. 14 of the *Income Tax Assessment Act* 1915 valid ?

(2) Is the said five per centum income derived in Australia or derived from a source within Australia ?

(3) Is the appellant liable under the said Acts to pay tax upon the said five per centum ?

(4) Is the appellant entitled to deduct from his gross income all outgoings and expenses incurred by him in maintaining and repairing the said land and improvements, including in such outgoings and expenses sums paid or expended and costs incurred for manure, top-dressing lawns and wages paid for garden up-keep ?

On a similar appeal by the same appellant in respect of the financial year 1916-1917, *Cullen* C.J. stated another case for the opinion of the High Court, which was substantially as follows :—

1. This is an appeal from assessment of income tax for the financial year 1916-1917.

2. The above-named appellant is a taxpayer under the *Income Tax Assessment Act* 1915-1916 and the *Income Tax Act* 1916, and as such is liable to pay income tax upon income received by him during the said financial year.

3. The appellant duly made a return as required by the said Acts, and the respondent has assessed him for income tax for the said financial year and has included in such assessment, as taxable income of the appellant, and has claimed to be paid income tax upon five per centum of the capital value of certain land and improvements thereon owned and used by the appellant for the purpose of residence and enjoyment and not for the purpose of profit or gain. The said land is situate near Sydney in the State of New South Wales.

4. The appellant claims :—(*a*) That the said five per centum is not income and therefore cannot be included as a subject of taxation in the above-mentioned Acts as such Acts are laws imposing taxation upon income, and that the appellant is therefore not liable to pay income tax thereon. (*b*) That the appellant is not liable for

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any tax inasmuch as the said *Income Tax Assessment Act* 1915-1916 is invalid on the ground that it deals with more than one subject of taxation. (*c*) That the said five per centum is not income liable to be taxed under the said *Income Tax Act* 1916. (*d*) Or, in the alternative, that if the said five per centum be income of the appellant upon which he is liable to be taxed he is entitled to deduct from his gross income all outgoings and expenses incurred by him in maintaining and repairing the said land and improvements, including in such outgoings and expenses sums paid or expended and costs incurred for manure, top-dressing lawns and wages paid for garden up-keep.

5. The respondent has disallowed the claims mentioned in par. 4 hereof, and the appellant by notice of objection duly objected to the said assessment, and by arrangement with the respondent it has been agreed that such notice of objection shall be treated as a notice of appeal pursuant to sec. 37 of the said *Income Tax Assessment Act* 1915-1916.

6. For the purposes of this case the said return, assessment and notice of objection are to be taken to be before the Court.

7. On the hearing of the appeal before me the following questions, which in my opinion are questions of law, have arisen, and at the request of the parties I state this case for the opinion of the High Court.

The questions for the determination of the High Court are :—

(1) Is the appellant entitled to raise the questions hereinafter appearing as questions 2 and 3 ?

(2) Is the *Income Tax Act* 1916, by reason of its incorporating therein the *Income Tax Assessment Act* 1915-1916, invalid on the ground that it deals with more than one subject of taxation, that is to say, that by sec. 14 of the last mentioned Act the said first mentioned Act imposes taxation upon five per centum of the capital value of certain property as described in sec. 14 (*e*) as well as taxation upon income ?

(3) Is the said five per centum either (*a*) income from personal exertion or (*b*) income derived from property within the meaning of the *Income Tax Act* 1916 ?

(4) (This question was in identical terms with the fourth question in the first case).

Mitchell K.C. and *Innes* K.C. (with them *Harper*), for the appellant. The *Income Tax Act* 1915 by sec. 4 imposes taxation upon income derived from personal exertion and income derived from property. The subject matter of sec. 14 (*e*) of the *Income Tax Assessment Act* 1915 is not in any sense income, and is certainly neither income derived from personal exertion nor income derived from property as those terms are defined in sec. 3 of the *Income Tax Assessment Act* 1915. It is a fictitious thing which has no existence in fact, and without any statutory enactment it cannot be said to be " derived " in Australia or even " derived " at all.

[ISAACS J. referred to *Commissioners of Taxation* v. *Kirk* (1).]

The Assessment Act has purported to create three kinds of income, namely, income derived from personal exertion, income derived from property and the notional income specified in sec. 14 (*e*). The *Income Tax Act* has imposed taxation upon the first two of these three, but not upon the third. If this construction be not accepted, then the *Income Tax Act* 1915, incorporating as it does the *Income Tax Assessment Act* 1915, deals with two subjects of taxation, and is therefore invalid under sec. 55 of the Constitution (*Osborne* v. *The Commonwealth* (2)). The *Income Tax Act* 1915 purports to tax income, and the subject of sec. 14 (*e*) of the *Income Tax Assessment Act* 1915 is not income. No provision similar to that in sec. 14 (*e*) is to be found in any of the Income Tax Acts of England or of the Australian States except in the South Australian *Taxation Act* 1884, sec. 12 (7), and the Victorian *Income Tax Act* 1895, sec. 9 (4), which is a copy of the last mentioned section, and there it is recognized that the subject of taxation is not income at all.

[ISAACS J. referred to 5 & 6 Vict. c. 35; 57 & 58 Vict. c. 30; 58 & 59 Vict. c. 16; *London County Council* v. *Attorney-General* (3); *Corke* v. *Fry* (4); *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted* (5); *Coomber* v. *Justices of Berks* (6).]

(1) (1900) A.C., 588, at p. 592.
(2) 12 C.L.R., 321.
(3) (1901) A.C., 26, at pp. 37, 38, 44.
(4) (1896) W.N., 128; 3 Tax Cas., 335.
(5) (1907) A.C., 264.
(6) 9 Q.B.D., 17, at p. 26; 10 Q.B.D., 267, at p. 277; 9 App. Cas., 61.

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The test is: What is the common understanding of the term income? (*Waterhouse v. Deputy Federal Commissioner of Land Tax* (*S.A.*) (1).) Applying that test, five per cent. on the capital value of land occupied by a man for residence is not income.

[GAVAN DUFFY J. Has not the Legislature taken the annual pecuniary benefits that a man receives and taxed them under the name of "income"?]

No. There cannot be a class within which income as ordinarily understood and the subject of sec. 14 (*e*) both fall. The fact that in England, where Parliament has plenary power, a somewhat similar provision has been put into Acts imposing taxes upon incomes is irrelevant to the determination of the question whether the *Income Tax Act* falls within the terms of sec. 55 of the Constitution unless that practice had become so general that it had come to be common knowledge that taxation of income includes such a provision. If the subject of taxation be taken to be the annual pecuniary benefits received by a man, the subject of sec. 14 (*e*) cannot come within that class, because it has no relation in fact to the pecuniary benefit received. [Counsel also referred to *Bank of Toronto* v. *Lambe* (2); *Tennant* v. *Smith* (3); *Morgan* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (4); *Crosse* v. *Raw* (5); *Budd* v. *Marshall* (6).]

Leverrier K.C. (with him *Coffey*), for the respondent. On the question of construction, the word "income" is used in the *Income Tax Acts* and the *Income Tax Assessment Acts* as including annual benefits received which can be reduced to a money value. The Acts tax a group or genus of things of which that described in sec. 14 (*e*) is one. Whether a person enjoys his property in kind or in the form of money, it would be equitable for the Legislature to tax him on the same basis in respect of both. Without any other aid than the language of the Acts the Court can say that the subject matter of taxation is single—it is the annual benefits received by a taxpayer whether they are the result of personal exertion or are derived from property which he possesses or occupies rent free.

(1) 17 C.L.R., 665, at pp. 675, 676.
(2) 12 App. Cas., 575.
(3) (1892) A.C., 150.
(4) 15 C.L.R., 661.
(5) L.R. 9 Ex., 209, at p. 212.
(6) 50 L.J.Q.B., 24.

The inclusion of a similar provision in other Statutes taxing incomes may be regarded as showing that such a subject as that in sec. 14 (*e*) was, for the purposes of taxation, recognized to be income.

Mitchell K.C., in reply. The interpretation of an Australian Statute should be governed by Australian surroundings rather than by English surroundings (*Attorney-General for the Commonwealth of Australia* v. *Colonial Sugar Refining Co. Ltd.* (1)).

Cur. adv. vult.

The following judgments were read :—

April 26.

BARTON A.C.J. Under sec. 38 of the *Income Tax Assessment Act* two cases for the opinion of this Court have been stated by the learned Chief Justice of New South Wales sitting as a Court of Appeal. They both arise under sec. 14 (*e*) of the Acts, which runs thus: "The income of any person shall include" (*inter alia*) "five per centum of the capital value of land and improvements thereon owned and used or used rent free by the taxpayer for the purpose of residence or enjoyment and not for the purpose of profit or gain."

The sub-section originally concluded with certain words not material to the present purpose, which by the amending Act No. 39 of 1916 were omitted from the sub-section and added to sec. 18 (1) of the Principal Act. The questions we have now to deal with are not affected by the change.

The cases are stated in respect of two successive assessments, that for the financial year 1915-1916 and that for 1916-1917. The appellant's assessment in each instance includes in his taxable income five per centum of the capital value of certain land and improvements thereon owned and used by the appellant for the purpose of residence and enjoyment and not for the purpose of profit or gain. It is common to the appellant's claim in both cases that the five per centum is not income, and therefore cannot be included as a subject of taxation in these Acts, as they are laws imposing taxation on income, and that the appellant is therefore not liable to pay income tax thereon. Other grounds of objection

(1) (1914) A.C., 237, at p. 254; 17 C.L.R., 644, at p. 652.

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are stated. For these, and for the questions with which each stated case concludes, I refer to the cases themselves, but it is right to mention here that the fourth question, which is identical in each case, is not now pressed by appellant's counsel, and is not to be answered.

With this preface, it is convenient to state at once my answers to each set of questions.

In Case No. 1, I answer as follows:—(1) Yes, valid. (2) Yes. (3) Yes.

In Case No. 2, I answer as follows:—(1) Yes. (This question was not argued before us). (2) No. (3) Income derived from property.

The Tax Act passed in each of the years in question contains a section prescribing that the Assessment Acts shall be incorporated and read as one with the Tax Act.

In Case No. 2 there is an obvious slip in question 2. What is meant is a query whether the Statutes incorporated are invalid on the ground there stated. The Tax Act, if it stood alone, would not be subject to the objection. It would merely be unworkable for other causes.

The real matter argued is whether the legislation is nullified by the second paragraph of sec. 55 of the Constitution for the reason that, as alleged, it deals with more than one subject of taxation, the contention being that taxation on five per centum of the capital value of the property described in sec. 14 (*e*) introduces a second subject matter in addition to the income tax.

What is meant by dealing with "one subject of taxation only" as those words are used in the Constitution? To my mind, the meaning of a subject of taxation cannot be confined to an impost or imposts on a mere item. I think the framers were speaking with reference to the common understanding of the term as exemplified in legislation. See *Bank of Toronto* v. *Lambe* (1). Was, then, a provision such as that now impeached—I do not mean the exact provision, but any provision similar in character—included in income tax legislation? Such legislation of course included not only the imposition of the tax but the machinery for dealing with

(1) 12 App. Cas., 575, at p. 582.

the whole subject. To answer this question one must look at previous legislation, and must also remember that the Bill for a Constitution was first framed by a Convention of representatives of all the Colonies, which are now States, and after affirmation by popular vote in each Colony was passed by the Imperial Parliament. It is fair, therefore, to conclude that the legislation both of the United Kingdom and of the several Colonies was not lost sight of in framing sec. 55.

In England, the income tax laws extend back to the year 1799. In that year Schedule A to the Act 39 Geo. III. c. 22 substituted a new schedule for Schedule A to C 13, which imposed the income tax. In that schedule we find the following expressions :—

"1. Income arising from lands, tenements, and hereditaments.—General Rule. . . . 'Annual value of lands'" is "to be understood as signifying the aggregate amount of the rent at which the same are let, or if not let, are worth to be let by the year" &c.

Under the same head of income : Second Case.—"Houses and buildings occupied by the owner.—The income arising from such houses or other buildings shall be taken to be the fair rent at which houses of the like description are usually let or might be let by the year, unfurnished, as near as may be."

We see by the first of these instances that income was considered as arising from the annual value of lands, and whether let or unlet. And we see by the second that income was considered to arise from houses and buildings even when occupied by the owner. And in both cases the basis is the annual value.

Reference may next be made to the Act 5 & 6 Vict. c. 35, which may be called the principal modern Act. It was passed at the instance of Sir Robert Peel's Government in 1842. It is a singular thing that this Act does not use the expression "income tax" at all, and it has been referred to in some books as a Property Tax Act. But it has usually been regarded and spoken of by legislators and Courts as an Income Tax Act, and has, in fact, long been universally spoken of as the *Income Tax Act of* 1842. It deals with a matter pretty closely similar to the subject of sec. 14 (*e*). For in Schedule A, No. 1, General Rule, these words are used : "The annual value of lands, tenements, hereditaments, or heritages . . . shall be

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understood to be the rent by the year at which the same are let at rack-rent . . . but if the same are not so let at rack-rent, then at the rack-rent at which the same are worth to be let by the year; which rule shall be construed to extend to all lands, tenements, and hereditaments, or heritages, capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed, and of whatever value" &c.

In other Acts which followed these, such as the many Customs and Inland Revenue (Finance) Acts passed by the same Parliament, the provisions of the older schedules are preserved more or less closely. In general, the provisions of the later Finance Acts relating to income tax no longer contain any Schedules, but in those parts of them which deal with income tax it is common to find annual value of property as well as profits and gains made chargeable. The earlier schedules seem to be left as matter of course in the later Acts. Reference may be made to the Acts of 1894, 1895, 1896, 1897, 1899 and 1900.

In the case of *London County Council* v. *Attorney-General* (1) Lord *Macnaghten* said :—" Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Schedule D and those assessed under Schedule A or any of the other schedules of charge. One man has fixed property, another lives by his wits ; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all. Schedule A contains the duties chargeable for and in respect of the property in all lands, tenements, and hereditaments capable of actual occupation. There the standard is annual value. It is difficult to see what other standard could have been adopted as a general rule. But there again, if the subject of charge be lands let at rack-rent, the annual value is ' understood to be the rent by the year at which the same are let.' In every case the tax is a tax on income, whatever may be the standard by which the income is measured. It is a tax on ' profits or gains ' in the case of duties

(1) (1901) A.C., 26, at p. 35.

chargeable under Schedule A and everything coming under that schedule—the annual value of lands capable of actual occupation as well as the earnings of railway companies and other concerns connected with land—just as much as it is in the case of the other schedules of charge. And it is to be observed that the expression 'profits or gains' which occurs so often in the Income Tax Acts is constantly applied without distinction to the subjects of charge under all the schedules. I need not trouble your Lordships by giving instances of this use of the expression, because I shall presently have occasion to call your Lordships' attention to a section in the Act of 1842 in which it so happens that the expression 'profits or gains arising from lands, tenements, hereditaments, or heritages,' is used to denote the annual value of lands capable of actual occupation brought into charge under Schedule A." His Lordship referred later to the argument for the Crown in the Court below that "the tax under Schedule A is a tax on property and is totally distinct from income tax under Schedule D," and after remarking that that argument appeared to have been adopted by the Court below without qualification, he used these words: "With all deference, I do not think that that is a sound view of the Income Tax Acts."

Lord *Macnaghten* went on to give an interesting review of the development of income tax legislation, which may well be studied, but which I forbear to quote. At page 45 of the same case Lord *Davey* said: "The truth is that the income tax is intended to be a tax upon a person's income or annual profits, and although (for conceivable and no doubt good reasons) it is imposed in respect of the annual value of land, that arrangement is but the means or machinery devised by the Legislature for getting at the profits."

We see, then, that the income tax legislation of England has preserved throughout the two rules that income tax may be founded on the annual value of lands and houses, and that such annual value may be assessed upon them, whether let or not, if they are capable of actual occupation of whatever nature, and for whatever purposes they are occupied or enjoyed.

I turn now to the legislation of Australian Colonies before Federation.

The South Australian *Taxation Act* 1884 (No. 323) provides

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as follows in sec. 12 (7): "Whenever land with improvements thereon shall be used for the purpose of residence or enjoyment, and not for the purpose of profit or gain, by any party who would be liable to pay income tax in respect of the income thereof, if the same produced an income, such land shall be deemed to return to such party an income of five pounds per centum on the actual value thereof." The Victorian *Income Tax Act* 1895 (No. 1374) makes substantially identical provision in sec. 9 (4).

Thus we see that legislation of Australian Colonies on this subject of taxation enacted before the date of Federation had embodied a provision not only resembling but almost entirely similar to that now in question, making chargeable in the hands of the occupying owner the annual value of lands and improvements. Any difference there may be is entirely conformable to the same principle.

Provisions such as I have described were therefore well within the scope of income tax legislation as understood at the time of Federation, and I think it is impossible to deny that they formed part of one subject of taxation. The various framers of the Constitution cannot be supposed to have ignored all this in making use of the expression as it occurs in sec. 55. As legislators, they must be taken to have understood what was meant by an Income Tax Act and by the scope of income tax as a common subject of legislation. And I make no doubt that they expressed the general understanding of the people.

The principle that the words "one subject of taxation" in sec. 55 of the Constitution, which after all had for its purpose the prevention of what is known as "tacking," do not exclude from a subject of legislation, when dealt with by the Commonwealth, provisions similar to those which have become usual in legislation previous to Federation upon any one specific subject of taxation, is elucidated in the judgments of this Court in the case of *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (1), and in a minor degree in the earlier case of *G. G. Crespin & Son* v. *Colac Co-operative Farmers Ltd.* (2).

But it is further argued that the Assessment Act itself does not

(1) 22 C.L.R., 367. (2) 21 C.L.R., 205.

really make the subject of sec. 14 (*e*) taxable as income, and it must therefore be accounted an additional tax of another kind. After what I have stated it can scarcely be contested that it may be made the subject of income taxation. But the objection is that the Statute has failed to make it income. It is pointed out that "income from personal exertion" or "income derived by any person from personal exertion" is defined in sec. 3, and that "income from property" or "income derived from property" is also defined in the same section; and that nothing is taxable which is not included within one or other of these definitions. The subject of sec. 14 (*e*) is said not to be so included, because, as it is not in itself income, the provision of sec. 14 that it is included in income amounts to no more than if it were ordained to be "deemed" income, and that therefore the sub-section effects nothing. But it seems to have been overlooked that the definition of income from property is very far-reaching, for its interpretation is that it means all income derived in Australia and not derived from personal exertion. That the subject of sec. 14 (*e*) is income is, I think, sufficiently shown already. If it is "derived" in Australia, being *ex concessis* not derived from personal exertion, it must be income from property within the meaning of the Act. Is it then "derived" from its source? Under the English Acts similar income is said to be income "arising from lands &c." or "income arising from . . . houses or other buildings." I see no difference between income arising from a source and income derived from a source, at any rate for present purposes, and the two interpretations would carry precisely the same meaning for present purposes if the one word were substituted for the other. In *Commissioners of Taxation* v. *Kirk* (1) will be found observations by Lord *Davey*, speaking for the Judicial Committee, on the words "derived," "arising," or "accruing," which are to the point in this connection. The case arose under the *Land and Income Tax Assessment Act of* 1895 (N.S.W.), and, speaking of the terms of sec. 15 of that Act, the learned Lord said: "Their Lordships attach no special meaning to the word 'derived,' which they treat as synonymous with 'arising' or 'accruing'."

(1) (1900) A.C., at p. 592.

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Isaacs J.

For these reasons I am of opinion that the several questions ought to be answered in the manner proposed at the outset of my judgment.

ISAACS J. Upon the case stated by the learned Chief Justice of New South Wales the appellant has raised three questions of law for our consideration. Two are questions of construction, the third is a constitutional question.

1. *Construction.*—The first question is whether under sec. 14 (*e*) of the *Income Tax Assessment Act* 1915-1916 the five per centum of the capital value therein mentioned is, upon the construction of the Commonwealth legislation and apart from any question as to the validity of that legislation, taxable as " income " within the meaning of the *Income Tax Act* 1915.

The appellant contends it is not, and for the following reason :— He says that inherently the use of a man's own land is not " income," in the sense in which that word is popularly understood ; that the taxing Act itself does not purport to tax anything but " income," that is, as popularly understood ; and that the incorporation of the Assessment Act in the Taxing Act does not really carry the matter further. He says that the Assessment Act by definition makes taxable only " income derived from personal exertion " and " income derived from property," and leaves these two expressions, which exhaust the area of taxability, to bear their own natural meaning, and that, taking each word of those expressions in its natural meaning, neither expression comprehends the mere use of land.

As to the effect of sec. 14 (*e*), he says that true it is the section says " the *income* of any person shall include " such use, but as it does not go on to say this notional income shall be deemed to be " derived " from the land the Legislature has by a blunder, for no other cause could be suggested, stopped short of language which brings such use within the letter of the taxing provision, and so this " income " escapes taxation.

It is plain that Parliament has expressly declared that all income " derived in Australia " shall be taxed within declared limits, which are unnecessary to be considered now. It has declared that all such

income shall be divided into two classes, namely, that "derived from personal exertion" and that "derived from property." It defines the first, and in order, as it seems to me, to prevent such an argument as I am now dealing with from prevailing, it throws all income not within that definition into the other class, whether in natural strictness it might be shown to be derived from property or not. It is manifest, therefore, that the whole argument of the appellant on this branch rests on the word "derived." If "derived" from the land, it is of course derived "in Australia" and "from property."

The word "derived" was considered by the Privy Council in *Kirk's Case* (1), an income tax case, and their Lordships attached no technical meaning to the word, but considered it in such a connection as equivalent to "arising or accruing." In the original Imperial *Income Tax Acts* of 1799 (39 Geo. III. c. 13 and c. 22) similar benefit is, by sec. 2 of the former Act, included in the description of income that "shall arise from lands, tenements, or hereditaments." Further, in the *London County Council Case* (2) that consummate lawyer and master of the English language, Lord *Macnaghten*, speaks of such "income" as "derived" from the property as its source. If support were needed for such high authority, it can be found in the use of the word "derived" as recognized by lexicographers. In the *Oxford Dictionary*, under the word "Derive" (vol. III., D, p. 229, col. 3, par. 6), the definition includes "to . . . get, gain, obtain (a thing *from* a source)." This exactly touches the present contention. The examples there given show how broadly the word may be used.

Consequently, once concede that the use of the land is "income" within the Statute—that is, something which "comes in"—then, as it must come in from some source in Australia, the word "derived" is apt to express the idea.

The first point as to construction therefore fails.

2. *Validity.*—It is then argued that, if the true construction of the Act is to make the use of the land taxable as "income," sub-sec. (*e*) of sec. 14 is invalid because inherently such a "use" is not "income," but something distinct, and is declared taxable in the

(1) (1900) A.C., at p. 592. (2) (1901) A.C., at p. 35.

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same Act as true income. The point is that any Act that does so contravenes that part of sec. 55 of the Constitution which enacts that "laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only."

It is obvious that, if for that reason sec. 14 (*e*) is invalid, so also must the whole *Income Tax Act* 1915 be invalid. The question of invalidity of the sub-clause, it must be observed, does not arise on the Assessment Act itself, because that class of Act does not fall within the prohibition relied on in sec. 55, but it does arise upon the Taxing Act (No. 41 as amended) because it incorporates the provisions of the Assessment Act. Therefore, if there are two distinct subject matters of taxation, the same argument is equally applicable to both. It is unnecessary to remind ourselves of the gravity of the situation. No doubt, if the Court is convinced that there has been a violation of the constitutional prohibition, it must give effect to the organic law, regardless of the consequences. But at the same time it must exercise great care before taking a step which would go far to disorganize the whole finances of the Commonwealth, more particularly at this serious crisis in our history.

The prohibition mentioned was not inserted as a trap for the Commonwealth Legislature, and through them for the nation. It was intended as a genuine protection to the people of the Commonwealth, by guarding the Senate from compulsive acquiescence in one tax by the moral necessity of passing another distinct tax. To secure that end the test is unity of subject matter of taxation in each measure, so that each proposed tax may be fairly considered on its merits.

I have in former cases (*Osborne's Case* (1) and *National Trustees &c. Co.'s Case* (2)) expressed more fully the reasons for my views upon the subject, and I adhere to them as so expressed. One quotation I made in the former case from a judgment of the Supreme Court of the United States (3) I venture to repeat as specially appropriate to the present case: "The objections should be grave, and the conflict between the Statute and the Constitution palpable, before the judiciary should disregard a legislative enactment upon the sole ground that it embraced more than one object."

(1) 12 C.L.R., at pp. 363-364. (2) 22 C.L.R., at p. 378.
(3) 107 U.S., 147, at p. 155.

Now, I entirely agree, as I stated in the *National Trustees &c. Co.'s Case* (1), that the singleness of a subject cannot be conclusively determined by the mere fact that Parliament has chosen to group together several distinct subjects, and, I would add, even if Parliament chose to give a collective name to the group. It is really a question of fact whether the subject matter of an Act is single. The test, in my opinion, is whether, looking at the subject matter which is dealt with as if it were a unit by Parliament, it can then, in the aspect in which it has been so dealt with, be fairly regarded as a unit, or whether it then consists of matters necessarily distinct and separate. I lay stress on the words "in the aspect in which it has been dealt with," because from the interlacings of the circumstances of life a thing may, from one point of view, stand apart from everything else, and, from other points of view, may become a component part of other things. An atom of oxygen may be regarded as completely segregated, or it may form an integral portion of a man, or of the ocean. And in the determination of the question of fact, which may be extremely complicated, great weight must be given to the fact that in any given legislation Parliament, drawn from the whole nation and familiar with its circumstances, has thought the subject of the tax as dealt with was in fact a unity. Before a Court says that is a legal impossibility according to the general understanding of the community, the impossibility must be demonstrably clear. Is it clear in the present instance? This part of the appellant's case depends upon his satisfying the Court that the words "one subject of taxation," as applied to Commonwealth legislation for taxing incomes in Australia, necessarily prohibit in an Income Tax Act passed in 1915 the inclusion of a tax upon such beneficial use of land as is equal to the annual value of 5 per cent. on the capital value of the land.

The material date for this purpose is not, as was argued, the year 1900, when the Constitution was passed, but 1915, when the *Income Tax Act* was passed. The Constitution is presumably to stand for all time; and what was a single subject in 1900 may not be so a century hence, and *vice versâ*. At the time the Act was passed, did

(1) 22 C.L.R., 367.

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it deal with what could then, in the circumstances of the Commonwealth, be fairly regarded as a single subject? If it could then be fairly regarded, and if Parliament has thought fit to regard it, as a unity, no Court is, as I conceive, at liberty to reverse Parliament's determination to treat it as one. Any other method of consideration would rigidly stereotype as at 1900 all the possible subjects of taxation in Australia, and the prohibition would be a snare and a danger.

Now, first let us see how the matter was regarded in Australia up to 1915.

The Parliament of South Australia by the *Taxation Act* 1884 (No. 323) imposed a tax on "land in South Australia" and a tax on "incomes arising or accruing in, or derived from, South Australia." The two subject matters were treated as distinct. Part I. imposed the land tax. Part II. imposed the income tax. Part III. contained provisions for arriving at the taxable amount of both classes of taxation. Sec. 12 related solely to income tax, and has importance in the present case. It did not purport to add any new or artificial class to "income." The Act gave no definition of "income," but by secs. 2 and 10 divided all "income"—whatever that might be—into income "derived from personal exertion" and income "the produce of property." Then sec. 12 provided that "the taxable amount of the income of any taxpayer shall be ascertained as follows":—(*inter alia*) (VII.) "Whenever land with improvements thereon shall be used for the purpose of residence or enjoyment, and not for the purpose of profit or gain, by any party who would be liable to pay income tax in respect of the income thereof, if the same produced an income, such land shall be deemed to return to such party an income of five pounds per centum on the actual value thereof."

From the structure of the Act, and particularly from the opening words of sec. 12, which govern all its sub-sections, the Legislature seem to have had no doubt that the use of land for the purposes mentioned might in legislative parlance be properly described as "income" and, moreover, be more justly and perhaps more truly placed among the income tax provisions than among the land tax provisions of the Act. But having in sec. 10 limited the tax to

income the "produce" of property, the Legislature apparently intended by the word "produce" to require the actual *production* of money or money's-worth, and so sub-sec. VII. was inserted, not to enlarge the meaning of "income" as that Legislature evidently understood and intended it, but to extend the tax to "income" not actually "*produced*," and in the case mentioned to fix a legislative standard of "production."

In Victoria an Income Tax Act was passed in 1895 (No. 1374). It substantially followed the South Australian Act with respect to the matters mentioned, and notably in the division of income in the interpretation section (sec. 2), in the description of the tax (secs. 5 and 8), which again limited the liability with respect to property income to "income" the "produce" of property. Sec. 9 corresponds to sec. 12 of the South Australian Act. It is a section which deals with deductions, and makes provisions for special cases. Like the South Australian Act it does not purport to add any new or artificial subject to "income," but similarly extends what otherwise would be "income produced."

Of course it does not follow that, merely because a tax is laid upon "income" *simpliciter*, that draws with it a tax upon the beneficial "use" of land; but it does follow that the two Parliaments mentioned, speaking for the people of two Colonies, as they were then, used the word "income" as legitimately covering such a use where it was substantially equivalent to a money benefit, if the intention to employ the word in that sense was manifested. And in those two Acts that intention seems quite manifest.

Other States, though passing Acts for tax on incomes, have not included this provision. This, however, is purely negative, because the omission may have arisen from many causes other than the only one which would favour the appellant's contention. Indeed, some sections (*e.g.*, in the Queensland Act of 1902, sec. 16 (VII.) and sec. 19) might be regarded as supporting the contrary position. I treat the legislative position, however, in those other States as if they were neutral.

Reverting to the cases of South Australia and Victoria, it is clear that in a considerable proportion of the population of Australia as far back as 1884 and 1895, respectively, the public notions of

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"income" for legislative purposes might rationally include such a "use" as is now in question. Was that notion peculiar to South Australia and Victoria; or was it not an adaptation by certain Australian Parliaments of the use and connotation of the word "income" as used by the Imperial Parliament and British Judges for a very long period, a use and a connotation which has come to us in that connection as part of the English language itself? It appears to me to be the latter.

Going back to the earliest legislation on the subject, it seems to me to be even there a legislative recognition of what Parliament at all events believed was a proper use of the word "income." In January 1799 an Act (39 Geo. III. c. 13) was passed for "granting certain duties upon income." It had schedules which I have not before me, but that is immaterial because in March of the same year, by c. 22, new schedules were enacted to the earlier Act.

The earlier Act by sec. 2 granted certain rates and duties (*inter alia*) upon "all income arising from property" &c., whether "such income as aforesaid shall arise from lands, tenements, or hereditaments" &c. The new schedules enacted the rules for estimating "the income of the current year" and the first general heading of Schedule A is "Income arising from lands, tenements, and hereditaments." Then follows a "General Rule" applying to all the fourteen "cases" subsequently mentioned into which such incomes were subdivided. That general rule defines the annual value of lands as the aggregate amount of the rent at which the same are let or *if not let are worth to be let* by the year. The special rule for the first "case," which is "*Income of lands occupied by the owner*," that is, of lands referred to in the general rule as lands "not let," provides that "such income shall be taken at the amount of one year's rent, according to the rate at which such lands are *worth to be let* by the year" &c., and also "of a sum not less than the amount of one-quarter, or more than one-half, of the annual value of such lands . . . in addition to such rent; except" &c.

Passing then to 1842, an Act (5 & 6 Vict. c. 35) was passed, reviving the tax, which had lapsed for several years. This Act renders reference to the Act 46 Geo. III. c. 65 unnecessary. With amendments, the Act of 1842 has continued to the present time. Schedule

A, enacted by sec. 60 of the Act, provides for estimating "Lands, Tenements, Hereditaments," and, with the substitution of rack-rent for ordinary rent, substantially extends the rule above mentioned "to all lands, tenements, and hereditaments . . . capable of actual occupation, of whatever nature, and for whatever purpose occupied or enjoyed," with certain exceptions mentioned that are immaterial here.

Sec. 167 dealing with claims for exemptions speaks of "the *income arising* from the occupation of such lands, tenements, hereditaments." Sec. 190 enacts Schedule G, which gives rules as to returns, and par. XVII. of that Schedule, in prescribing the statement necessary to obtain discharge or exemption, includes the following: "Fourth—Statement of the amount of *income derived* according to the three preceding declarations." In view of the argument on construction, I lay stress on the words "income derived" (the italics in all these quotations being mine) because they are used to include the first declaration, namely, "Declaration of the amount of value or property or profits returned, or for which the claimant hath been or is liable to be assessed."

The Act of 1853, with which the Act of 1842 must be read, confirms by Schedule A the parliamentary view previously taken.

In order to satisfy my mind more completely as to whether from the general acceptation of the term at the time Parliament in January 1799 or in 1842 could be assumed to have attached a violent meaning to the word "income" as applied to the case we are considering, I have read the debates of those two periods, the first in the *Parliamentary History of England*, vol. XXXIV., and the second in the *Parliamentary Debates*, vol. LXI. From a perusal of those debates I am quite clear that neither Mr. Pitt nor Sir Robert Peel thought any irrational meaning was given to the term in that relation.

In the earlier instance we find (p. 6) that Mr. Pitt in December 1798 spoke of his proposed measure as "a general tax upon all the leading branches of income." At p. 7 he said: "It will be necessary to simplify and to state with precision the different proportions of *income arising* from land, from trade annuity or professions which shall entitle to deduction." (I have italicized the words

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"income arising.") At p. 99 Mr. Pitt distinguished between a tax on income, and a tax on capital, and defended his Bill as an instance of the former. It is noticeable also that the publishers of the volume, in the heading to the pages last referred to, used the phrase "Debate in the Commons on the Income Duty Bill."

As to the debate on the 1842 Bill, I refer to pp. 439, 902 and 911 as showing that Sir Robert Peel manifestly thought he was not distorting the English language when employing the word "income" to cover the whole of Schedule A. In 1885, in their 28th report, the Commissioners of Inland Revenue say that the Property and Income Tax is "popularly called the Income Tax." Lord *Davey* observes in the *London County Council Case* (1), at p. 44, that the expression "income tax" is used in 1856 by Parliament to describe the tax levied under Schedule A. His Lordship's observations on that and on the following page are very material to the present discussion, and I apply them here.

In one sense a tax in respect of the owner's occupation of his own property is not strictly a tax on "income," that is, where we limit "income" to money actually coming in. Neither is occupation of another person's property rent free in return for services strictly income—it is rather a substitution for income. Nor, strictly speaking, is the occupation of one's premises for the purposes of carrying on a business an outgoing (see *Commissioners of Taxation* v. *Antill* (2)). But in a broader sense these things are respectively equivalent to income and expenditure. A man who uses his own house for residence is receiving a benefit analogous to rent from letting the property, or interest upon the money value of the property, and calculable in cash. The employee is also receiving a benefit which can be reduced to money terms; and the third man is putting into the business the equivalent of the rent he could get from letting the property or the interest upon the money value of his land. I would refer to *Coomber's Case*—9 Q.B.D., 17, particularly the judgment of *Grove* J. at p. 26; 10 Q.B.D., 267, and particularly at p. 277; and 9 App. Cas., 61 (*passim*)—as strongly supporting in many ways the views I have expressed. *Tennant* v. *Smith* (3), particularly

(1) (1901) A.C., 26.
(2) (1902) A.C., 422.
(3) (1892) A.C., 150.

at p. 165, cited for the appellant, is not in his favour; it shows that, strictly, mere occupation of a house is not "income," but it also shows that occupation that may be turned into money may reasonably be considered as money. And, if that is so, the argument of invalidity vanishes. *Corke* v. *Fry* (1), and particularly Lord *Kinnear's* judgment, runs in the same direction. Subsequent English finance legislation has continued the same use of the word "income."

It is therefore an established fact that for about 100 years—even allowing for the gap between 1816 and 1842—millions of people in the United Kingdom have been familiar with the use of the word "income" for taxation purposes as comprehending the use of a person's own land where his possession is convertible into money.

Judicial decisions, as has been seen, treat the legislation as proceeding not upon an arbitrary, but upon a rational, basis. Australian legislation (South Australia in 1884 and Victoria in 1895) adopted, and the Parliament of all Australia has now adopted, the same policy as the English Parliament. If other local Parliaments have not gone to the same length, that is a matter of discretion. But looking at the English legislation, as well as contemporary speeches, and the subsequent judicial interpretation of the Acts as evidence of the meaning of the word "income" for legislative purposes, and for the same purpose viewing the adoption of the same comprehensive signification by so large a portion of the Australian people prior to the Commonwealth legislation, the conclusion appears to me inevitable. It is that the word "income" has become embedded in the English language in Australia as well as in England in relation to legislation as being capable of including, if so intended by the Legislature, in an Income Tax Act such a subject matter as is comprised in sec. 14 (*e*) of the Commonwealth Act of 1915. As to that matter of fact, which I, sitting here as an Australian Judge am called upon to determine, I have no hesitation in so holding.

Therefore the objection that the *Income Tax Act* 1915 deals with more than one subject matter of taxation fails. But, further, if I were not so clearly satisfied I would still be prepared to hold that

(1) 3 Tax Cas., 335.

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the appellant had not satisfied the onus on him of clearly establishing the contrary, so as to invalidate the Act—in other words, he has not clearly demonstrated that Parliament could not reasonably have considered the word "income" as sufficiently comprehensive; and I should have held accordingly that the objection equally failed.

3. *Deductions.*—There was a question as to deductions, the second question upon construction, but it was purely hypothetical. No facts were stated which raised the question, and as the Crown was not prepared to admit such facts it would not be proper in this case for the Court to go even so far as to express an extra-judicial opinion. The necessary course to be followed with regard to "a case stated" is laid down in *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1).

GAVAN DUFFY AND RICH JJ. The question whether the Acts of the Commonwealth Parliament under discussion deal with more than one subject of legislation is one of fact. We find that they deal with one subject of legislation only. We should have arrived at this conclusion without the assistance of the list of Statutes, Imperial and Colonial, which have been cited by our brother *Isaacs*, and the cases decided under them, but we agree with him in thinking that they afford overwhelming evidence in support of our opinion.

Questions answered accordingly. Costs of the special case to be in each case costs of the appeal.

Solicitors for the appellant, *Minter, Simpson & Co.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

(1) 16 C.L.R., 591.