[HIGH COURT OF AUSTRALIA.]

BLACK AND OTHERS . . . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . RESPONDENT.

Land Tax—Assessment—Land subject to lease—Coal mine—"Rent reserved by the lease"—Royalty—Land Tax Assessment Act 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *sec.* 28.

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SYDNEY, *April* 15.

Knox C.J., Isaacs, Rich and Starke JJ.

Sec. 28 of the *Land Tax Assessment Act* 1910-1916 provides, by sub-sec. 1, that the owner of a freehold estate in land who before 17th November 1910 had granted a lease of the land should, for the purpose of assessment for land tax, be entitled, during the currency of the lease, "to have the unimproved value (if any) of the lease deducted from the unimproved value of the land"; and, by sub-sec. 3 (*a*), that for the purposes of the section "the unimproved value of a lease . . . means the value of the amount (if any) by which four and a half per centum of the unimproved value of land exceeds the annual rent reserved by the lease, calculated for the unexpired period of the lease at four and a half per centum, according to the calculations based on the prescribed tables for the calculation of values."

The appellants leased to certain lessees a coal mine with the plant and machinery thereon for a term of years at a rental of £500 per annum, provided that it should be lawful for the lessees without payment of any royalty in respect thereof to work the mine and remove therefrom such quantity of coal as would at a certain rate per ton produce in any one year the sum of £500. It was also provided in the lease that the lessees should each year pay a certain royalty in respect of all coal above that quantity obtained by them from the mine during that year.

Held, that the amount of the royalty so paid in any one year, as well as the rent of £500, was included in the term the "rent reserved by the lease" in sec. 28 (3) (*a*) of the *Land Tax Assessment Act* 1910-1916.

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SPECIAL CASE.

On an appeal to the Supreme Court of New South Wales by Ann Black, Katherine Black, Clementina Black and Agnes Mathie Black from a reassessment of them for land tax for the year 1914-1915, 1915-1916 and 1916-1917 by the Federal Commissioner of Land Tax, *Ferguson* J. stated a special case, which was substantially as follows, for the opinion of the High Court :—

1. At the date of the lease hereinafter mentioned the appellants were and still are the owners in fee simple of certain coal-bearing lands situate in the Newcastle District in the State of New South Wales.

2. By memorandum of lease dated 18th April 1910 the appellants leased unto Frances Sneddon and Daniel Sneddon, the executrix and executor of the will of Andrew Sneddon deceased, as such executrix and executor as aforesaid, all and singular the mines, beds, veins and seams of coal within and under the said lands and also the pits or shafts then open thereon and known as the Teralba Colliery, together with such of the boilers and other machinery in, about or upon the said lands as belonged to and were the property of the appellants, together with the rights and subject to the provisions and restrictions in the said lease contained for the term of forty-three years from 1st October 1907.

3. Under the said lease the lessees were to hold the said premises at the yearly rental of £500 payable as therein provided, and it was to be lawful for the lessees without paying any rent or royalty in respect of the same to work, carry away from, forth and out of the mines and seams of coal thereby demised such quantity of coal as would at the rate of sixpence per ton on large coal and threepence per ton on small coal produce in any one year of the tenancy thereby created the sum of £500. The lessees were also to render and pay to the appellants every year during the said term, in respect of all coal wrought and brought to bank from the said mines thereby demised over and above such quantity of coal as might be worked in respect of the aforesaid fixed rental as aforesaid, the royalty of sixpence per ton for round or large coal and threepence per ton for small coal for every ton so wrought or brought to bank from the said mines and either used for the making of coke or sold or disposed of otherwise than in the development or working of the said mines;

such royalties to be calculated and paid quarterly on the respective days fixed for the payment of the certain rents in every year.

4. There was a further provision for payment by the lessees to the appellants of a royalty of sixpence per ton on all coal which the lessees permitted to be carried or taken away or used, consumed or otherwise disposed of without having the same first weighed and entered into the books of accounts; and also for payment at the current market value for all timber which the lessees permitted to be carried or taken away or used or disposed of except for the purposes in the said lease provided.

5. It was also provided that a royalty of threepence per running foot should be paid by the lessees to the appellants in respect of any ironbark or mahogany cut, felled and carried away which should have a diameter of at least 18 inches.

6. The appellants in accordance with the provisions of the *Land Tax Assessment Act* duly furnished returns for the years 1914-1915, 1915-1916 and 1916-1917, claiming deductions in respect of the unimproved value of the said lease calculated under the provisions of sec. 28 of the said Act on the basis of the annual rent of £500.

7. These deductions were allowed in each of such years by the Commissioner, and land tax was assessed and paid by the appellants accordingly.

8. The Commissioner has since required a return from the appellants showing the amounts received by them for rent and royalty for the above-mentioned years, and a return was made in response to such requisition showing such respective amounts to be £701, £2,483 and £2,217.

9. The Commissioner has reassessed the land tax payable by the appellants on the basis that the whole of the said amounts in the last paragraph set out are rent, and on this basis has allowed a much reduced deduction in respect of the unimproved value of the lease for the year 1914-1915, and no deductions at all for either of the years 1915-1916 or 1916-1917.

10. The appellants, by notice of objection dated 8th April 1918 and duly received by the Commissioner, stated their objections to the said reassessments as being for the following reasons: (1) the deductions under sec. 28 of the Federal *Land Tax Assessment Act*

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1910-1916 previously allowed for the years 1914-1915, 1915-1916 and 1916-1917 were rightly allowed, and that the Commissioner was in error in now disallowing portion thereof; (2) that the Commissioner was in error in treating the royalties paid by the lessees as annual rent reserved by the lease; (3) that in calculating the lessees' interest in the lease to Frances and Daniel Sneddon the Commissioner is bound by the annual rent reserved by the lease being the sum of £500; (4) that the unimproved value of the lease having been calculated for the years 1914-1915, 1915-1916 and 1916-1917 in accordance with the provisions of the Act and according to the calculations based on the prescribed tables for the calculations of values, and such calculations having been accepted by the Commissioner and an assessment in accordance therewith having been made, and the amount of such assessment having been duly paid, the Commissioner is now estopped from making a reassessment in respect of such years: and claimed that the original assessments should stand.

11. The said objections have not been allowed by the Commissioner, and the said reassessment has not been altered or amended, and the appellants did not accept the said reassessment, and the appellants duly asked that the said objections should be treated as an appeal, and the Commissioner duly transmitted the said objections to the Supreme Court of New South Wales for determination as a formal appeal.

12. The appeal came on for hearing before me on 1st April 1920, when the facts hereinbefore set forth were admitted, and at the request of the parties I consented to state a case for the opinion of the High Court of Australia upon the following questions arising in the appeal, and which in my opinion are questions of law.

The questions of law for the opinion of the High Court are:

(1) Whether in ascertaining the unimproved value of the said lease for the purposes of sec. 28 of the said Act the annual "rent reserved by the lease" is to be calculated on the basis of the said fixed rent of £500;

(2) Whether the Commissioner was in error in treating the royalties paid in each year as annual rent;

(3) Whether the Commissioner is estopped from making a

reassessment of the land tax payable by the appellants in respect of the years 1914-1915, 1915-1916 and 1916-1917.

The third question was not argued.

Bethune, for the appellants. The object of sec. 28 of the *Land Tax Assessment Act* 1910-1916 is to find what is the unimproved value of the land having regard to the existing lease. The direction given by that section for finding that unimproved value is by deducting the then unimproved value of the lease from the unimproved value of the freehold. It would be fallacious in estimating the unimproved value of the lease, which is for a future period, to take as a basis a sum paid as royalty in the past year which might vary greatly in future years. The basis intended by the Act is the fixed or occupation rent.

[KNOX C.J. What would happen if no other consideration than a royalty were reserved ?]

It would have to be ignored. A royalty is not rent within the meaning of the term the "rent reserved by the lease." A royalty is in the nature of a payment for a portion of the soil rather than a rent (*Greville-Nugent* v. *Mackenzie* (1); *Taylor* v. *Evans* (2); *Gowan* v. *Christie* (3)).

[KNOX C.J. referred to *Coal Cliff Collieries Ltd.* v. *Federal Commissioner of Land Tax* (4).

[ISAACS J. referred to *In re Earl of Darnley*; *Clifton* v. *Darnley* (5).

[RICH J. referred to *In re Aldam's Settled Estate* (6); *Attorney-General of Ontario* v. *Mercer* (7).]

The result of including the royalty would be that the greater the amount of the coal that was removed, the greater would be the taxable unimproved value of the land and the less the value of the lease, and that the freeholder would have to pay the tax in every case in which the royalty equals or exceeds four and a half per cent. of the unimproved value of the land.

R. K. Manning, for the respondent, referred to *R.* v. *Westbrook* (8);

(1) (1900) A.C., 83.
(2) 1 H. & N., 101.
(3) L.R. 2 H.L. (Sc.), 273.
(4) 24 C.L.R., 197.
(5) (1907) 1 Ch., 159.
(6) (1902) 2 Ch., 46, at p. 58.
(7) 8 App. Cas., 767, at p. 777.
(8) 10 Q.B., 178, at p. 204.

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KNOX C.J.

Apperly v. *Federal Commissioner of Land Tax* (1); *Sandgate Urban District Council v. County Council of Kent* (2). [He was stopped.]

KNOX C.J. This is a case stated by *Ferguson* J. for the opinion of this Court on certain questions arising under the *Land Tax Assessment Act* 1910-1916, in the matter of an appeal by Ann Black and others against an assessment by the Commissioner of Land Tax. Three questions are asked. With regard to the third, Mr. *Bethune* admitted that it ought to be answered in the negative; and that disposes of it. The first two questions raise one point, and that is whether, in the case of a mining lease which reserves a dead rent as well as a royalty on the coal won in excess of the amount which would be covered by the dead rent, the "rent reserved by the lease" in sub-sec. 3 (*a*) of sec. 28 is to be limited to the dead rent, or is to include also the royalty on coal extracted which was not covered by the dead rent. It is quite clear that either solution of the question leads to curious results, but I fail to see that one construction leads to any more unexpected or absurd result than the other. I am of opinion that the words "annual rent reserved by the lease" include both dead rent and royalty. Three Judges of this Court in *Apperly* v. *Federal Commissioner of Land Tax* (1) dealt with the question of royalties and my brother *Isaacs*, in delivering the judgment of himself and my brothers *Gavan Duffy* and *Rich* said (3): "Royalties are true rent (*Daniel v. Gracie* (4)) and can be distrained for, which is a characteristic of rent, subject to agreement." *Daniel* v. *Gracie* has been affirmed in a later case, and there is additional authority on the point in the decision in the case of *Attorney-General of Ontario* v. *Mercer* (5), referred to by my brother *Rich*, which points in the same direction.

It was argued by Mr. *Bethune*, in support of his contention that the rent reserved by the lease was the dead rent of £500 per annum, that a mining lease in consideration of a payment of royalty is really more akin to a sale of portion of the property than to a lease at a rent reserved. Whether that be so or not, the point cannot arise in the present case for two reasons: one is that the case is stated

(1) 17 C.L.R., 535.
(2) 79 L.T., 425.
(3) 17 C.L.R., at p. 546.
(4) 6 Q.B., 145.
(5) 8 App. Cas., at pp. 777-778.

on the assumption that the appellants and the persons working the mine under this lease are in the position of lessors and lessees; and the other is that, if they are not in the position of lessors and lessees, sec. 28 of the Act does not apply and there is no question for the Court to consider. Apart from our having to take it as a lease, it clearly is a lease; it is a mining lease, and we must construe the section so as to apply it in every case of lessor and lessee which comes within the section.

For these reasons I think that question 1 ought to be answered No; question 2, No; and question 3, No.

The order will be that the questions be answered accordingly, that the case be remitted to the Supreme Court to be further dealt with, and that the costs of this special case be costs in the appeal.

ISAACS J. I agree, and for the same reasons.

RICH J. I agree.

STARKE J. I agree.

Questions answered accordingly. Case remitted to the Supreme Court to be further dealt with. Costs of special case to be costs in the appeal.

Solicitors for the appellants, *Frank A. Davenport & Son.*

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

B. L.