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appellants with her was habitual, and I do not doubt the impulse came from them.

There remains only the question of confirmation. This, in the circumstances, is impossible. The influence continued, there was no independent advice, and nothing was done which could be construed as an act of ratification. All that is relied on is that Mrs. Reynolds in conversation expressed her happiness and satisfaction with what she had done and the treatment she was receiving. That is insufficient.

The appeal, in my opinion, should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellants, *C. Davenport Hoggins.*

Solicitors for the respondents, *Dobson, Mitchell & Allport.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McKELLAR . . . . . APPELLANT;

AND

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

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MELBOURNE, *Feb.* 23, 24.

SYDNEY, *April* 26.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

War-time Profits Tax—Assessment—Capital of business—Change of ownership of business—Time in respect of which value of capital to be ascertained—Business carried on by executor—War-time Profits Tax Assessment Act 1917-1918 (*No.* 33 *of* 1917—*No.* 40 *of* 1918), *secs.* 4, 7, 12, 14, 15, 16, 17.

Sec. 17 (1) of the *War-time Profits Tax Assessment Act* 1917-1918 provides that "the amount of the capital of a business shall be taken to be the amount of its capital paid up by the owner in money or in kind, together with all accumulated trading profits invested in the business, with the addition or subtraction of balances brought forward from previous years to the credit or debit respectively of profit and loss account."

A purchased certain lands prior to 1890 and carried on the business of a pastoralist thereon until his death in that year. On his death the lands and the business passed under his will to his nephew B, who carried on the business upon the lands until his death in 1901. Thereafter the appellant, as executrix of B, carried on the business upon the lands pursuant to the trusts of B's will.

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy* and *Starke* JJ. (*Higgins* J. dissenting), that in ascertaining, under sec. 17 (1) of the *War-time Profits Tax Assessment Act* 1917-1918, the amount of the capital of the business for the purpose of calculating the pre-war standard of profits according to the percentage standard, the value of the lands should be taken as at the date when the lands were purchased by A.

CASE STATED.

On the hearing of an appeal by Grace Violet McKellar, executrix of the will of John Cumming deceased, against an assessment of her for war-time profits tax for the year 1917-1918, *Knox* C.J. stated a case, which was substantially as follows, for the opinion of the Full Court :—

1. On 9th December 1919 the appellant, Grace Violet McKellar, as executrix of the will of John Cumming deceased, pursuant to sec. 18 of the *War-time Profits Tax Assessment Act* 1917-1918, by her attorney, William Riggall, furnished to the Commissioner of Taxation a return for the purpose of calculating the pre-war standard of profits according to the percentage standard, and showing the capital of the business of the estate of the said John Cumming deceased for the accounting period.

2. The said John Cumming deceased, prior to his death, which occurred on 21st September 1901, carried on the said business, which was that of a pastoralist upon certain lands in Victoria known as Mount Violet Station which he had acquired in 1890 as devisee under the will of his uncle, the late George Cumming, who died on 20th May of that year. The said George Cumming had purchased the said lands and carried on the said business thereon during his lifetime.

3. After the death of the said John Cumming the appellant, as his executrix, pursuant to powers in that behalf contained in his will continued to carry on the said business of a pastoralist upon the Mount Violet Station. The above-mentioned return was made in respect of the said business so carried on.

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4. The lands known as Mount Violet Station consist of 16,351 acres, and form a property used for depasturing sheep and cattle.

5. The value of the said lands at the time of the death of the said John Cumming was (as assessed for the purposes of probate duty) £3 17s. per acre, or a total value of £63,181.

6. Between the death of the said John Cumming and the end of the last pre-war trade year, the said lands increased in value by reason of the general increase of the value of land in Victoria. Improvements of a capital nature were also effected to the said lands to the value of £3,322 up to the year of assessment.

7. The appellant, in the return referred to in par. 1 hereof, claimed that for the purpose of ascertaining the capital of the business the said lands should be taken into account at their then present market value, which was stated in such return to be £6 10s. per acre. She claims that the value at the end of the last pre-war trade year was not less than this sum, and now contends that the value should be ascertained as at that time.

8. Pursuant to sec. 21 of the said Act the Commissioner caused an assessment to be made for the purpose of ascertaining the profits upon which war-time profits tax should be levied for the period beginning 1st July 1917 and ending 30th June 1918. In such assessment the Commissioner, in ascertaining the amount of the capital of the business for the purpose of calculating the pre-war standard of profit brought the lands into account as part of the amount of the capital of the business at probate value, namely, £3 17s. per acre, as per par. 5 hereof, and added thereto the cost of improvements effected after the date of probate up to the year of assessment, namely, £3,322.

9. On 27th April 1920 the Commissioner caused notice in writing of such assessment to be given to the taxpayer, who, being dissatisfied with the said assessment, on 25th May 1920 lodged an objection in writing with the Commissioner against such assessment upon the ground (*inter alia*) that in arriving at the capital of the business the value of the lands should be taken into account at their present market value as shown in the return.

10. The Commissioner decided the said objection against the taxpayer, who, being dissatisfied with the decision of the Commissioner,

gave notice asking the Commissioner to treat the said objection as an appeal and forward it to the High Court of Australia for hearing. Such appeal came before me when I consented to state this case.

11. The Commissioner contends that the lands represent an asset acquired without purchase, and that therefore their value as capital by virtue of sec. 17 (4) must be taken to be their value at the time when the asset was acquired by the executrix, *i.e.*, at the date when the business became by the death of John Cumming vested in the executrix. The appellant contends that this does not represent the amount of such capital thereof, and that the said amount is the value of the lands at the time for which the assessment is made.

The questions for the Court are the following :—

(1) Was the Commissioner right, when ascertaining the amount of the capital of the business for the purpose of calculating the pre-war standard of profits according to the percentage standard, in taking the value of the lands at the date of the death of the testator ?

(2) If the answer to question 1 is No, as at what date should the value of the lands be taken for the said purpose ?

Owen Dixon K.C. (with him *Pigott*), for the appellant.

Gregory, for the respondent.

During argument reference was made to *John Smith & Son* v. *Moore* (1) ; *Hamer* v. *Inland Revenue Commissioners* (2).

Cur. adv. vult.

April 26.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. George Cumming purchased certain lands known as Mount Violet Station and carried on the business of a pastoralist on those lands during his life. On his death the lands and the business passed under his will to his nephew, John Cumming, who died in 1901. After John Cumming's death the appellant, as his executrix, continued to carry on the business pursuant to the trusts of John Cumming's will.

(1) (1921) 2 A.C., 13, at p. 33. (2) (1921) 1 K.B., 60.

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An assessment was made by the Commissioner for the purpose of ascertaining the profits upon which war-time profits tax should be levied in respect of war-time profits arising from this business during the period 1917-1918. The pre-war profits of the business were apparently less than the "percentage standard" provided for in the *War-time Profits Tax Assessment Act* 1917-1918, and so the "percentage standard" was taken as the pre-war standard of profits for the purposes of the Act. The percentage standard is provided for in sec. 16, sub-secs. 8, 9, 10, 11 and 12, of the Act.

But a difference arose between the Commissioner and the appellant as to the amount at which the lands forming the Mount Violet Station should be taken into account in ascertaining the capital of the business as existing at the end of the last pre-war trade year, that is, the year ending at the close of the last accounting period before 5th August 1914. The Commissioner insisted that the amount should be the value of the lands at the date of the death of John Cumming, whilst the appellant contended that the amount should be the value of the lands as at the end of the last pre-war trade year. Neither contention can, in our opinion, be upheld.

It is, perhaps, as well to make clear, before dealing with the specific sections of the Act, that the case treats the business as remaining always the same, although changed in its ownership. The Assessment Act contemplates such a case, and treats the business as "one concern" for the purpose of a comparison of profits between the pre-war and war years (see secs. 7 and 14, and *cf. John Smith & Son* v. *Moore* (1); *Gittus* v. *Inland Revenue Commissioners* (2)).

The pre-war profits are ascertained either upon profits actually arising from the business, calculated in accordance with the Act, or upon the system called the "percentage standard." The "percentage standard," which is the method applicable to this case, "shall be taken to be an amount equal to the statutory percentage on the capital of the business as existing at the end of the last pre-war trade year," subject to certain provisions immaterial to this case. The statutory percentage is ten per centum, subject also to certain provisions which are likewise immaterial.

Now, if the above provision stood alone, possibly the capital of

(1) (1921) 2 A.C., 13. (2) (1921) 2 A.C., 81.

the business to be ascertained would be the surplus of its assets over its liabilities to the creditors of the business. But it does not stand alone; for sec. 16 (11) provides that the provisions contained in Part VI. shall have effect with respect to the ascertainment of capital, and sec. 17 (1) of that Part provides that the amount of the capital of the business shall be taken to be the amount of its capital paid up by the owner in money or in kind, together with certain accumulated profits with the addition or subtraction of balances to credit or debit of profit or loss. The owner in this subsection must, in our opinion, be the owner of the business who has paid up the capital in money or in kind; he cannot be limited to the taxpayer, for that would in many cases destroy the basis of comparison intended by the Act. Thus, if the taxpayer acquired the business under a gift by will during the war period, the percentage standard could not be applied; for no capital paid up by the taxpayer in money or in kind could exist on the specified date. Yet the Act, as we have seen, contemplates the case of a business remaining always the same notwithstanding changes in ownership. If this be true, then the owner who brought the lands into the business was George Cumming, and the value of those lands must, in the case before us, be the purchase-money paid for them by him.

If cash had not been paid, or the lands had been acquired without purchase, then their value must have been taken at the time they were acquired in the business. A good deal of stress was placed upon the words "on the capital of the business *as existing* at the end of the last pre-war trade year." But the provision is so framed as to exclude, in our opinion, capital which may have been employed in the business and has been withdrawn (*cf.* sec. 12 (3)). The Act is framed for business men, who ordinarily keep accounts. And properly kept books should enable a business man to state the capital of his business paid up in money or in kind, and how much of it is existing, that is, not withdrawn from the business at any given time.

Further, the provision in sec. 17 that all accumulated trading profits invested in the business, with the addition or subtraction of balances brought forward from previous years to the credit or debit

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respectively of profit and loss, shall be taken into account in determining the capital of a business at the specified time, must not be overlooked: but no facts are stated in this case which enable us to say how far, if at all, the provisions affect these lands.

Lastly, we would add that the provisions of sec. 16 (13) have no application to this case, because the executrix is merely carrying on the business as the representative of John Cumming.

The answers to the questions stated should, in our opinion, be: (1) No; (2) At the date the lands were purchased by George Cumming.

ISAACS J. George Cumming purchased land in Victoria known as Mount Violet Station, and there carried on the business of pastoralist up to the time of his death in 1890. John Cumming, his nephew, was devisee of the land, and he continued the business on the same land until his death in 1901. The appellant, Grace Violet McKellar, as executrix of John Cumming's will, has since his death continued to carry on the said business in the same land. The question is how and at what period the land should be valued for the purpose of ascertaining the amount of capital of the business for calculating the pre-war percentage standard of profits.

The appellant contends that it should be taken at its market value at the time for which the assessment is made. The Commissioner contends that it should be valued as at the date of the testator's death, that is, when the appellant first became the owner of the business. I do not agree with either contention.

The *War-time Profits Tax Act* 1917 (No. 34 of 1917) imposes a tax on the "war-time profits . . . arising from any business," and by sec. 3 it incorporates the Assessment Act, which is to be read as one with the Taxing Act. The *War-time Profits Tax Assessment Act* 1917-1918 divides businesses into two classes—(1) established and (2) new. An "established business" means a business other than a "new business." A "new business" means a business which, in the opinion of the Commissioner, was not commenced until on or after 4th August 1912 and was not reasonably established until on or after 4th August 1914. That leaves to the final determination of the Commissioner, in cases where the identity of the business is not in question, the date of its actual commencement,

and, after that, its reasonable establishment, with reference to the commencement of the War. Here, no such questions of fact are in controversy—it is a pure question of law.

The Commissioner's contention is based primarily on the position that until the death of John Cumming the executrix had no interest in the business, and that when the new owner came in the business was a new one, as every change of ownership makes the business a new business. No doubt, says the Commissioner, the business of the appellant was an "established business" within the meaning of the Act, because it was commenced and established long before 1912, but it was not the same business as that carried on by the testator. It is quite true that, as shown by cases of which *Farhall* v. *Farhall* (1) is a leading example, the business carried on by an executor is in a sense his business, as distinguished from his testator's business. Still more clearly would that be so in the case of a purchaser of the whole business from the owner. But whether, for the purposes of this Act, the business of the appellant is the same business as that of her testator, or whether the business of A which he bought from B is the same as was the business of B, depends entirely on the intention of the Legislature as gathered from the terms of the Act itself. It has been decided on a very similar enactment in England—so similar as to make the decision applicable—that a change of ownership does not in itself affect the identity of the business transferred (*Gittus* v. *Inland Revenue Commissioners* (2)). The "business" is the subject of taxation, and the person to be assessed is primarily the person carrying it on at the moment of assessment (sec. 14 (2)). That sub-section, by giving power to the Commissioner to assess a former owner who has transferred it during the accounting period in respect of the period of his ownership, seems to place this position beyond any possible doubt. Not only is there nothing positive to indicate that a change of ownership destroys the identity of the business, but several specific portions of the Act, in addition to sec. 14 (2), assume the contrary. Such are sec. 7 (5), sec. 11 (1) (*a*) and sec. 16 (13). The Act, on its true construction, treats a business as a single profit-making machine; and, in order to see how far the profits made by it during the war

(1) (1871) L.R. 7 Ch., 123.

(2) (1921) 2 A.C., 81.

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period are attributable to war conditions, the profit-making capacity of the same machine during the pre-war period is to be ascertained irrespective of the earlier ownership of the machine, and then the two capacities are compared, adjustments being made, where necessary, for increase or diminution of capital employed at the respective periods. All that is necessary is to establish the identity of the machine throughout as a business. That is strongly shown by the definition quoted of "new business," because only a "reasonably established" business at the outbreak of war gets a fair start under war conditions. I am therefore unable to agree with the view put forward on behalf of the Commissioner.

On the other hand, the appellant's contention is also wrong in my opinion. It was argued for her that sec. 17 required the capital to be ascertained as at the assessment period. Apart from some special provisions in sec. 17, that section is concerned rather with the method of calculating the capital than with the time of calculating it. But, *ex naturâ rerum*, capital must be calculated for the same period as the profits. Consequently the capital in relation to the accounting period profits must be taken as at the accounting period according to the method prescribed by the Act. And the capital in relation to the pre-war percentage standard profits must be taken as at the appropriate pre-war period, which by the Act, sec. 16 (9), is fixed, apart from special cases, as at the end of the last pre-war trade year, and this, by sub-sec. 12, is defined as the year ending at the end of the last accounting period before 5th August 1914, and to fully understand this we have further to turn to sec. 7 (4), which defines "accounting period" by reference to the *Income Tax Assessment Act* 1915-1916.

Ascertaining the capital is simply ascertaining the value of the taxable machine as it stands when the profits are made. That value is, of course, equivalent to the expression in sub-sec. 1 of sec. 17, "the amount of the capital of a business"; and the method is prescribed which accommodates itself to both the accounting period and the pre-war period. Sub-sec. 1 provides that that "amount" shall be taken to be the "*amount*" (not "value") "of its capital paid up by the owner in money or in kind." Payment in kind is, in the absence of special provision, equivalent for sale purposes to payment

in money (*South Australian Insurance Co.* v. *Randell* (1)); and I understand "in kind" to refer to a case where an owner, in partnership perhaps, agrees to bring in so much capital reckoned in money value, and some of it is taken in in the form of goods or land at an agreed money value. I think it also, when read with sub-sec. 4, applies to the case of an owner purchasing for cash for the purposes of his business some asset as part of his working capital. It will be noticed that the phrase is "the amount of *its* capital," that is, the capital of the business as it stands at the appropriate moment. Then it is such amount of that capital as is actually "paid up," and by "the owner," that is, by the person who was owner, or the respective persons who were owners, of that business at the time or times when any of the still existing capital was "paid up" at any stage in the life of the business. And, however it was "paid up," whether in money or money's-worth, it would, so far as sub-sec. 1 is unaffected by any other provision, be computed in terms of money at the nominal sum "paid up." So far for the actual capital paid in as such from the moment of its introduction into the business. Then to this are to be added all accumulated trading profits made at any time and invested in the business, that is, treated as capital, and this adjusted by the addition or subtraction of balances brought forward from previous years to the credit or debit of profit and loss account. This, with the exception of the capital provided for in sub-secs. 2 and 3, is generally speaking the capital to be computed, which represents the money value of the business as the machine by which the profits for the given period have been made.

But then comes sub-sec. 4, which materially qualifies sub-sec. 1 in certain cases. Assets paid for in cash are still reckoned at the amount actually paid. But if not paid for in cash, that is, if either (1) paid for in kind or (2) created or (3) acquired without purchase, the "value" as distinguished from "amount" is to be ascertained. And the time as at which the value is to be ascertained is in each case *the time at which the asset was* (1) *paid for not in cash*, (2) *created* or (3) *acquired*. I disregard the later provisions of the sub-section as immaterial to this case.

I apply this construction to the land in question. It is found as

(1) (1869) L.R. 3 P.C., 101.

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an asset of the business at the given time and part of the capital. It was "acquired" by George Cumming, and by purchase, and it is to be implied in the absence of anything to the contrary that it was paid for in cash. If so, the conclusion is plain that it is to be taken into the account at the amount of cash actually paid by the owner, George Cumming, for the land.

I have carefully stated the position upon the plain words of the enactment, and, as it is a taxing Act, it must be taken just as it stands. I merely add one observation, as to one contention put forward for the appellant. It was suggested in argument, though I am not sure it was persisted in, though the contention is on the face of the case stated, that under sub-sec. 1 the "amount" of the capital at the given date was the then market value of the assets. But not only would that change the language of the sub-section, and notably from "amount" to "value," but it would run counter to sub-sec. 4.

In my opinion therefore, the asset in question should be taken into account as part of the capital at the price actually paid for it by George Cumming. I would add, however, that, if the land ought to be "valued" under sub-sec. 4, its value would be as at the time it was acquired by the business; and, unless George Cumming made either an unusually good or unusually bad bargain, its value then can be properly taken to be what he paid for it. And I would further add that nothing I have said is intended to exclude the necessary elasticity in applying the parliamentary standards of capital so as to meet the business requirements of any particular case. One thing, however, is clear to me, that the personal ability or incapacity of an owner in the conduct of his business, so as to make his profits larger or smaller, is not, and is not intended to be regarded as, part of his capital, or as detracting from it, so as to be the subject of taxation.

HIGGINS J. According to the case as stated, John Cumming acquired in 1890 under the will of his uncle, George Cumming, certain lands on which the uncle had been carrying on the business of a pastoralist, and John Cumming continued to carry on that business till his death, 21st September 1901. Since that time the

executrix has continued to carry on the business in pursuance of a power contained in the will of John Cumming. An assessment has been made by the Commissioner as for war-time profits tax for the year 1917-1918, and there is a question as to the proper mode of assessment.

This tax, in imitation of the English excess profits duty (*Finance (No. 2) Act* 1915, Part III.), is, substantially, an addition to income tax in respect of extra profits made from any business during the War (1914-1918); and the profits have to be determined on the same substantial principles as the profits would be determined for the purpose of income tax (sec. 10). To find the extra profits made for any war year, the standard profits made from the business before the War have to be found, then the profits made during the War, and the difference is taxable (sec. 7 (2) (*c*)). But, for mitigation of the burden on the taxpayer, it is provided in sec. 16 (8), (9), (10), that if the pre-war profits standard be less than ten per cent. on the capital of the business as existing at the end of the last pre-war trade year, the percentage standard of ten per cent. is to be taken to be the pre-war profits standard. The lower the pre-war profits, the greater is the margin between them and the war profits, and the greater the tax. The percentage standard has to be applied in this case; and the question is, as at what date should the value of the land be taken? The Commissioner has taken the value as at the death of the testator John Cumming, 27th September 1901, accepting the value as stated in the valuation for the purposes of probate. The executrix says that as the land increased in value (apart from improvements) since that date the value should be taken as at the end of the last pre-war trade year. Under sec. 16 (12) the last pre-war trade year means the year ending at the end of the accounting period before 5th August 1914; that is to say, in this case, the year ending on 2nd September 1913.

In my opinion, both parties are wrong. The Commissioner's method is wrong, for it ignores the words of sec. 16 and of sec. 17. Under sec. 16 (9), (10), the percentage standard is to be taken to be an amount equal to ten per cent. "on the capital of the business as existing at the end of the last pre-war trade year"; under sec. 16 (11) the provisions contained in sec. 17 are to have effect with respect

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to the ascertainment of capital; under sec. 17 (1) the amount of the capital of a business is to be taken to be the amount of its capital paid up by the owner in money or in kind; under sec. 17 (4) where any asset has been "acquired without purchase," the value of the asset is to be taken as its value at the time that the asset was acquired.

Now, I cannot think that the devolution of the land from John Cumming to the executrix of his will was an acquisition of the land by the executrix without purchase, within the meaning of sec. 17. "Acquired" connotes, in this context at all events, the getting of the land for one's own benefit. The land still belongs to the estate of John Cumming; that estate gets the profits of the business, and would suffer from any losses. The tax is to be assessed on any person *for the time being* owning the business (sec. 14); and *for the time being*, for the year of assessment, John Cumming is still treated by the Commissioner as the owner. The assessment is made on Mrs. McKellar, not in her own right, but as executrix of John Cumming. Under sec. 17, to find the capital of a business, we have to look at the capital paid up *by the owner*; or, if the owner did not pay for it (as in this case John Cumming acquired the land by devise, without purchase) we have to look for the value of the asset at the time that the asset was acquired. The last person to "acquire" the land, within the meaning of the section, was, in my opinion, John Cumming; and he "acquired" it without purchase in 1890. The value of the land at the time of devolution to the executrix has nothing to do with the matter.

The general scheme of the Act seems plain enough. Tax the owner for the time being (sec. 14). To find the amount of the tax (under the percentage standard), find what he paid for it; or if he got it for nothing, find its value at the time that he acquired it. Then calculate ten per cent. on the amount, in money or in money value, which the owner invested in the business.

The method proposed by the executrix is wrong, in my opinion, because any increase or decrease in value of the land as fixed capital has not to be taken into account in finding the profits of the business. There is not one word that I can find in the Act, from first to last, indicating that there is to be a revaluation of the asset as at the end

of the last pre-war trade year. What is taxed by the Act is "profits from any business . . . arising after the thirtieth day of June one thousand nine hundred and fifteen" (sec. 7); and the profits are to be determined on the same principles as profits for income tax (sec. 10). Like the income tax, this tax is on earnings irrespective of capital. The business in question is the business of a pastoralist, not of a land-jobber; and the tax is on the actual profits whether the fixed capital has increased in value or decreased in value, has doubled in value or has vanished. There are at least two legitimate meanings for the word "profits"—as shown in *Lee* v. *Neuchatel Asphalte Co.* (1), recently followed by the Court of Appeal in England in *Ammonia Soda Co.* v. *Chamberlain* (2). Under one meaning, you take into account the appreciation or depreciation of capital; under the other, you merely find the excess of revenue receipts over expenditure chargeable to revenue—you look at the profit and loss account, not the capital account. This Act—as the *Income Tax Act* also—imposes a tax on profits of the latter class. But the Act makes special arrangements in case of the taxpayer where there has been "exceptional" depreciation or obsolescence (due to the War) of assets employed in the business (sec. 11). If capital has been withdrawn from the business, or if additional capital has been employed in the business, there are special arrangements provided (sec. 12). In other cases sec. 17 (1) and (4) applies —see what capital was put in by the owner, and compute the percentage on the amount thereof, or (if a gift) on the value at the time that the capital was put in. The percentage on the capital put in by the owner is treated by Parliament as being a rough standard of pre-war profits for the purpose of comparison with his profits made during the War. Parliament says, in effect: "We shall treat the owner as making before the War at least ten per cent. on the capital which he invested in the business."

It is urged that such a scheme is improbable. Even if it were, we have to obey the Act. But I am unable to see the improbability. Under the English Act, on which our Act is based, there is no revaluation of assets in ascertaining profits; for, under Schedule IV., Part III., to the *Finance (No. 2) Act* 1915 the amount of capital of a

(1) (1889) 41 Ch. D., 1. (2) (1918) 1 Ch., 266.

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business is to be taken to be—"(*a*) so far as it consists of assets acquired by purchase, the price at which those assets were acquired, subject to any proper deductions for wear and tear or replacement, or for unpaid purchase-money; . . . (*c*) so far as it consists of any other assets which have not been acquired by purchase, *the value of the assets at the time when they became assets of the trade or business*, subject to any proper deductions for wear and tear or replacement." This provision leaves no room for the consideration of unearned increment or decrement. The question always is what did the owner put into his business as capital, expressed in terms of money. Then he is to be treated as having earned ten per cent. on that capital before the War, unless it be established that he earned even more.

The only alternative to this scheme seems to be to go back to the beginning of the business, before the owner for the time being became the owner; for instance, if land has been used continuously for pastoral business since 1820 or 1830, to treat the value of the land in such remote years as the value on which the percentage should be calculated if the value can be ascertained. In the present case it is alleged that George Cumming, the uncle, had purchased this land (the date is not mentioned), and had carried on (perhaps others had carried it on before him) the said business thereon during his life-time; and we should have, under sec. 17 (1), to find what he paid for the land, calculate ten per cent. on *that* purchase-money, and compute the tax on the difference between this ten per cent. and the actual profits made during the War. This means that if a man bought a business before the War from an incompetent owner, who had been making one-half per cent. on his capital, and if the buyer, by dint of skill and energy, made twenty per cent. on that capital, all the extra gain has to be treated as war profit and taxed as such. It is quite true that the tax is meant to be levied on the profits of "the business," as if it were a continuous profit-making machine; but, in my opinion, it is the business, the profit-making machine, *in the taxpayer's hands*. The Act means us to find the capital paid in or contributed by the owner, the taxpayer; it does not mean that he is to pay more tax because of the incompetence of his predecessor, near

or remote. The case of *Gittus* v. *Inland Revenue Commissioners* (1) shows that *è converso* "the loss in his business which a person is entitled to set off against the excess profits duty payable by him is a loss *personal to himself*." Not only would this alternative course, as suggested, be exceedingly harsh to the taxpayer as increasing the margin to be taxed, and difficult to justify on any grounds of good sense, but it is also inconsistent with sec. 17 (1); for this section bids us find the capital paid up "by *the owner*," the owner "for the time being" (sec. 14), the owner who is to be taxed—not to find the capital paid up by the first owner who started the particular business. I understand the word "owner" in sec. 17 to refer to the owner to be assessed for the tax, as also the word "owner" in sec. 15 (7) (*a*)—prescribing a deduction in the case of wasting assets, for a sinking fund to "recoup the amount expended by the owner in the purchase of the asset or (where the asset has been acquired otherwise than by purchase) the value of the asset, at the date when it was first used as a wasting asset for the purposes of the business, as known at that date." This view is confirmed by the words used in sec. 17 (6), relating to the exceptional case where a partnership uses rent-free a partner's land; for the capital in that case includes the amount of purchase-money paid *by him*, or the value if it was acquired by him without purchase. We are not to go back to the original owner of the business.

The scheme adopted by the Act becomes, to my mind, intelligible and consistent if we regard the draftsman as, by Part III., dealing with the simple, primary case—that of a business carried on by the one owner both before and during the War. Part IV. (sec. 15) deals in detail with "computation of profits"; Part V. (sec. 16) deals in detail with "pre-war standard"; and Part VI. (sec. 17) deals with the mode of ascertaining "capital" for the purpose of applying the percentage standard. In dealing with the pre-war standard (sec. 16), difficulties arise where the owner for the time being has not carried on the business for at least three pre-war trade years. Where the business has been carried on for two such years, sec. 16 (3) (*a*) prescribes what is to be done; where the business has been

(1) (1921) 2 A.C., 81.

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carried on for only one such year, sub-sec. 3 (*b*) prescribes what is to be done; where the business has been carried on for less than one year, sub-sec. 6 provides what is to be done.

It is said that if the taxpayer acquired the business during the war period the percentage standard could not, on the construction which I suggest, be applied. But it was not meant to be applied—the tax was not to be paid by such a taxpayer. If he bought the business during the war period, the extra profits made would be reflected in the purchase-money; and if he got the business by gift, his position is still simply that of one who has made no extra profits during the War. Under sec. 16 (13) he is to be treated as having commenced a new business on the change of ownership: "Where since the commencement of the last three pre-war trade years a business has changed ownership, the *provisions of this Act* shall apply as if a *new business* had been commenced on the change of ownership." "New business" is defined in sec. 4 as a business which, in the opinion of the Commissioner, was not commenced till 4th August 1912, and was not reasonably established till 4th August 1914 (and see sec. 11 (1A) and (1B)). The Act applies "the *provisions of this Act*"—all the provisions—to the case, including the provisions of sec. 14, allowing the Commissioner to treat the accounting period as the period ending on the date of the change of ownership, and to assess the tax on the person who owned the business *at that date*. In this respect, our Act goes further even than the English Act, which, in place of "the provisions of this Act," has, in its rule in the Schedule, the words "the provisions of *this Part of this Schedule*," so that the rule is confined to the "pre-war standard," and is inserted directly after the rule set out in our sec. 16 (6). It is significant too, that sec. 16 (6) (*b*) uses the words "business . . . carried on by *the taxpayer* before *his new business* commenced." The case of *Gittus* v. *Inland Revenue Commissioners* (1) comments on the narrow application of the words in the English Schedule IV., Part II., r. 5, and shows that the House of Lords rejected, even on that narrow application, the argument that a sub-section providing for set-off of losses applied to losses incurred by the predecessor of the owner

(1) (1921) 2 A.C., 81.

to be taxed. As *Atkin* L.J. said in the Court of Appeal, "it is quite plain that the sub-section is only applicable to the personal profit or personal loss of the person mentioned at the beginning"—the owner of the business for the time being (*Inland Revenue Commissioners* v. *Gittus* (1)). It is obvious that if the capital is to be taken as at the time that George Cumming, the uncle, purchased the land—before 1890, perhaps in the fifties of last century—the war profits tax would be increased, not merely by the operation of the War, but by the increment in value for many years before the War, and probably also by the skill of George or John in making the business more profitable.

In the present case we have only to apply the law to what I have called the simple, primary case—the case of the same man being owner during the War and for the three pre-war years; and, whatever difficulties may arise in exceptional and complicated cases, there seems to be no difficulty in applying to the simple case that scheme which is the most reasonable as a matter of business as well as consistent with true principles of construction.

When I say "reasonable as a matter of business," I have in mind what would appear in properly kept business books. Any entry as to capital contributed would show the capital contributed by the owner who keeps the books, not the capital contributed by some predecessor. The capital contributed by predecessors would not usually be within his ken. The ascertainment of the annual value of land by means of a percentage on the capital sum expended by the owner is a "rough method" often used, in default of better, in ordinary land valuations (see per *A. L. Smith* L.J. in *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (2)).

There is not, to my mind, any expression used in this Act which clearly compels us to treat the business as "one concern" for the purpose of this tax throughout a succession of owners of the land; and, even if the Act is equally susceptible of either construction, that construction should be adopted which bears less hardly on the taxpayer (*Armytage* v. *Wilkinson* (3)).

In my opinion, therefore, the percentage standard is to be applied

(1) (1920) 1 K.B., 563, at p. 579. (2) (1899) 2 Q.B., 14, at p. 20.
(3) (1878) 3 App. Cas., 355, at p. 370.

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to the value of the land as at the date that it was acquired without purchase by the owner—the taxpayer ; that is to say, in 1890.

Questions answered : (1) *No* ; (2) *At the date the lands were purchased by George Cumming.*

Solicitors for the appellant, *Blake & Riggall.*

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

B. L.

Appl *Thwaites* v *Ryan* [1984] VR 65

Foll *Ratto* v *Trifid Pty Ltd* [1987] WAR 237

Foll *Wardle, Re* 22 FCR 290

Foll *Ratto* v *Trifid Pty Ltd* (1985) 56 LGRA 22

Foll *Australia & New Zealand Banking Group Ltd* v *Widin* (1990) 102 ALR 289

Disod *T A Dellaca Ltd* v *P D L Industries Ltd* [1992] 3 NZLR 88

Refd to *Halloran* v *Minister* (1999) 105 LGERA 405

[HIGH COURT OF AUSTRALIA.]

COONEY . . . . . APPELLANT ;
DEFENDANT,

AND

BURNS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 24, 27, 28; *Mar.* 1.

SYDNEY, *April* 24.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Contract—Specific performance—Part performance—Contract signed by agent—Authority of agent not in writing—Application of doctrine of part performance—What constitutes part performance—Sale of lease of hotel—Lease handed to purchaser's solicitor—Preparation of transfer—Instruments Act 1915 (*Vict.*) (*No.* 2672), *secs.* 228, 229—*Statute of Frauds* (29 *Car. II. c.* 3), *sec.* 4.

Sec. 228 of the *Instruments Act* 1915 (Vict.) re-enacts sec. 4 of the *Statute of Frauds.* Sec. 229 provides that "Notwithstanding anything in this Act contained no action shall be brought upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them if the agreement or the memorandum or note thereof on which such action is brought is