H. C. OF A. 1923-1924.

BRADFIELD v. FEDERAL COMMISSIONER OF TAXATION.

Solicitor for the appellant, *W. H. Peers.*

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

B.L.

[HIGH COURT OF AUSTRALIA.]

CAMERON . . . . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION FOR TASMANIA . . } RESPONDENT.

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MELBOURNE, *Feb.* 18, 19; *May* 22.

KNOX C.J., ISAACS, GAVAN DUFFY, RICH and STARKE JJ.

Income Tax—Assessment—Valuation of live-stock—"Value as prescribed"—Regulations—Validity—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *secs.* 3, 14 (*a*), 65—*Income Tax Assessment Act* 1918 (*No.* 18 of 1918), *secs.* 2, 48—*Acts Interpretation Act* 1904 (*No.* 1 *of* 1904), *sec.* 9—*Income Tax Regulations* 1917 (*Statutory Rules* 1917, *No.* 280—*Statutory Rules* 1918, *No.* 315), *reg.* 46.

Held, by *Knox* C.J., *Isaacs, Gavan Duffy* and *Rich* JJ., (1) that the words "value as prescribed" in the definition of "value" in sec. 3 of the *Income Tax Assessment Act* 1915-1918 meant, not the true value ascertained in a prescribed manner, but an artificial or arbitrary sum which was to be deemed to be the value; (2) (*Starke* J. dissenting) that for the purpose of ascertaining the value of live-stock pursuant to sec. 14 (*a*) of the *Income Tax Assessment Act* 1915-1918, Statutory Rule 1918, No. 315, being invalid, the Commissioner was not entitled to rely on reg. 46 of Statutory Rule 1917, No. 280, as a prescription of value, for that regulation was itself inconsistent with the provisions of the *Income Tax Assessment Act* 1915-1916, under which it was made, and was not validated or adopted by the *Income Tax Assessment Act* 1918; and (3) that there was nothing in the *Income Tax Assessment Act* 1915-1918 which could be regarded as a prescription of value.

Held, therefore, by *Knox* C.J., *Isaacs, Gavan Duffy* and *Rich* JJ. (*Starke* J. dissenting), that in ascertaining the income of a grazier under sec. 14 (*a*) of the *Income Tax Assessment Act* 1915-1918 no sum could be taken into account in respect of the excess in value of live-stock owned at the end of the year of assessment over its value at the beginning of such year.

CASE STATED.

On the hearing of an appeal to the Supreme Court of Tasmania by Donald Norman Cameron from an assessment of him by the Deputy Federal Commissioner of Taxation for Tasmania for income tax for the years ending 30th June 1918 and 30th June 1919, *Ewing* J. stated a case, which was substantially as follows, for the opinion of the High Court :—

2. The appellant, pursuant to sec. 28 (1) of the *Income Tax Assessment Act* 1915-1918, furnished to the respondent a return setting forth a statement of the income received by him during the financial year ended 30th June 1918.

3. The respondent, pursuant to the said Act, made an assessment from the said return for the purpose of ascertaining the taxable income of the appellant upon which income tax should be levied, and paid by him, for the financial year ended 30th June 1919. Subsequently the respondent, pursuant to the said Act, made an alteration in the said assessment.

4. Included in the income from personal exertion in such assessment as so altered is a sum of £22, which represents the excess in value (as determined by the respondent) of live-stock (other than stud live-stock) owned and not disposed of by the appellant at 30th June 1918 over the value (as determined by the respondent) of live-stock (other than stud live-stock) owned and not disposed of by the appellant at 1st July 1917—the values of stud live-stock being debited and credited at cost price.

5. On 1st April 1921 the respondent caused notice in writing of the said altered assessment to be given to the appellant.

6. The appellant, pursuant to sec. 28 (1) of the said Act, further furnished to the respondent a return setting forth a statement of the income received by him during the financial year ended 30th June 1919.

7. The respondent, pursuant to the said Act, made an assessment from the said return for the purpose of ascertaining the taxable income of the appellant upon which income tax should be levied, and paid by him, for the financial year ended 30th June 1920. Subsequently the respondent, pursuant to the said Act, made an alteration in the said assessment.

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8. Included in the income from personal exertion in the last aforesaid assessment as so altered is a sum of £333, which represents the excess in value (as determined by the respondent) of live-stock (other than stud live-stock) owned and not disposed of by the appellant at 30th June 1919 over the value (as determined by the respondent) of live-stock (other than stud live-stock) owned and not disposed of by the appellant at 1st July 1918, the value of stud live-stock being debited and credited at cost price.

9. On 1st April 1921 the respondent caused notice in writing of the last aforesaid altered assessment to be given to the appellant.

10. Within thirty days after the service of each of the said notices, the appellant, being dissatisfied with each of the said altered assessments, lodged with the respondent objections in writing against each of the said altered assessments, and in each of such objections stated (*inter alia*) that one reason for the said objection was that he had no taxable income.

11. The respondent, having considered the said objections, wholly disallowed the said objections and gave to the appellant written notices of his decisions on the said objections. The appellant, being dissatisfied with the said decisions of the respondent, gave notices in writing requesting the respondent to treat each of the said objections as an appeal and to forward each of the said objections to the Supreme Court of the State of Tasmania for hearing.

12. The said appeals came on for hearing in the Supreme Court of Tasmania before me on 20th January 1922, and by consent of the parties were heard together.

13. Without hearing evidence I stated a case in writing dated 25th August 1922 for the opinion of the High Court of Australia, pursuant to sec. 38 of the said Act, upon certain questions arising in the appeals which in my opinion were questions of law.

14. The High Court of Australia, after hearing and determining one of the said questions, remitted such case to me with its opinion. The first question was answered "Yes," and the other questions were not answered (see *Cameron* v. *Deputy Federal Commissioner of Taxation (Tas.)* (1)).

15. The said appeals came on for further hearing in the Supreme

(1) (1923) 32 C.L.R. 68.

Court of Tasmania before me on 7th September 1923, when I heard and received evidence, subject to objection by appellant's counsel that no evidence of value of live-stock was relevant or admissible except evidence of values prescribed in accordance with the *Income Tax Assessment Act* 1915-1921, secs. 14 (*a*), 3 and 65.

16. I find that the appellant at all times material carried on the business of a stock farmer of sheep, cattle and horses, and that all his live-stock (other than stud live-stock) at the said times were of his own breeding and raising.

17. No further evidence than that of the appellant himself was called, because the result of his evidence generally and a calculation upon his figures led me to the conclusion that in each of the said years, if any tax is payable at all, the excess in value (as determined by the respondent) of live-stock (other than stud live-stock) owned and not disposed of by the appellant at the end of each of the said years over the value (as determined by the respondent) of live-stock (other than stud live-stock) owned and not disposed of by the appellant at the beginning of each of the said years is not excessive : and I find accordingly.

On the foregoing facts the following questions were asked :—

(1) Should the excess in value of live-stock (other than stud live-stock) owned and not disposed of by the appellant at the end of each of the said years over the value of live-stock (other than stud live-stock) owned and not disposed of by the appellant at the beginning of each of the said years be taken into account in computing the income of the appellant derived from personal exertion in each of the said years for the purposes of the said Act ?

(2) If yea to question 1, how should the value of such live-stock (other than stud live-stock) be arrived at ?

Keating, for the appellant. Reading the definition of " value " in sec. 3 of the *Income Tax Assessment Act* 1915-1918 into sec. 14 (*a*) of that Act, the value of live-stock that is to be taken into account is the " prescribed " value. By sec. 9 of the *Acts Interpretation Act* 1904 " prescribed " means prescribed by the particular Act or by regulations under it. There is no prescription of value in the *Income*

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Tax Assessment Act 1915-1918, and the only regulations made under it, namely, Statutory Rule 1918, No. 315 (which purported to amend and also to supplement reg. 46 of Statutory Rule 1917, No. 280), have been declared to be invalid (*Cameron* v. *Deputy Federal Commissioner of Taxation (Tas.)* (1)). There is, therefore, no value that can be taken into account under sec. 14 (*a*).

Sir Edward Mitchell K.C. (with him *J. H. Moore*), for the respondent. Statutory Rule 1918, No. 315, being *ultra vires*, is as inoperative as if it had never been made (*Norton* v. *Shelby County* (2) ; *Virginia Coupon Cases* (3) ; *Chicago, Indianapolis and Louisville Railway Co.* v. *Hackett* (4) ; *Eberle* v. *Michigan* (5)) ; and no part of it is severable (*Owners of s.s. Kalibia* v. *Wilson* (6)). If that be so, reg. 46 of Statutory Rule 1917, No. 280, is still in force, and should be applied. If that regulation cannot be applied, then the value should be ascertained under sec. 14 (*a*) of the *Income Tax Assessment Act* 1915-1918 as being an implied prescription of value.

Keating. Reg. 46 of Statutory Rule 1917, No. 280, had no force or efficacy at any time. In sec. 14 (*a*) of the *Income Tax Assessment Act* 1915-1916, under which that regulation was made, " value " meant real value ; and sec. 65 of that Act did not authorize the making of that regulation, for it is inconsistent with sec. 14 (*a*) in that it provides that the value is to be the fair average value and that the fair average value is to be determined by the Commissioner. If reg. 46 of Statutory Rule 1917, No. 280, was unauthorized by the then existing legislation, it was as if it never existed at all. The *Income Tax Assessment Act* 1918 did not adopt that regulation, but required regulations to be made subsequently to that Act. That Act for the first time provided that " value " in relation to live-stock was to mean " value as prescribed " (sec. 3).

Sir Edward Mitchell K.C. Reg. 46 of Statutory Rule 1917, No. 280, was not *ultra vires*, for it was not intended to substitute an arbitrary sum instead of the real value but to afford a means of

(1) (1923) 32 C.L.R. 68.
(2) (1886) 118 U.S. 425, at p. 442.
(3) (1885) 114 U.S. 269, at p. 310.
(4) (1913) 228 U.S. 559, at p. 566.
(5) (1914) 232 U.S. 700, at p. 705.
(6) (1910) 11 C.L.R. 689, at p. 697

arriving at the true value. If it was invalid, it was validated by sec. 2 (*j*) of the *Income Tax Assessment Act* 1918, which enacted the new definition of "value." That Act was not intended to render nugatory the provisions of sec. 14 (*a*) of the *Income Tax Assessment Act* 1915-1916, and if there were no valid regulations that section should be followed in ascertaining the value of live-stock.

Keating, in reply. Sec. 47 of the *Income Tax Assessment Act* 1918 expressly validates certain constructions and calculations arising out of the *Income Tax Assessment Act* 1915-1918. And sec. 48 of the *Income Tax Assessment Act* 1918 provides that certain sections of that Act shall operate retrospectively. Neither sec. 47 nor sec. 48 refers to sec. 2 (*j*), which enacted the new definition of "value" in relation to live-stock. That new definition, therefore, was neither validating nor retrospective, and required subsequent regulations. A line of cases up to *Attorney-General* v. *Milne* (1) established that to be liable under a taxing statute a subject must come clearly and unambiguously within its terms. The benefit of any doubt on that point is the right of the subject (*In re Finance Act* 1894 *and Studdert* (2)).

Cur. adv. vult.

May 22.

The following written judgments were delivered :—

KNOX C.J. The appellant at all times material carried on the business of a stock farmer of sheep, cattle and horses; and all his live-stock other than stud stock were of his own breeding and raising. The respondent assessed the appellant to income tax for the financial year ending 30th June 1919; and included in the income from personal exertion for the period covered by such assessment the sum of £22, representing the excess in value, as determined by the respondent, of live-stock, other than stud stock, owned and not disposed of by the appellant on 30th June 1918 over the value, as determined by the respondent, of live-stock, other than stud stock, owned and not disposed of by the appellant on 1st July 1917. The respondent also assessed the appellant to income tax for the financial year ending

(1) (1914) A.C. 765. (2) (1900) 2 I.R. 400, at p. 410.

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30th June 1920 on the same basis, the corresponding amount included in this assessment being £333. The appellant duly lodged objections to both assessments, one of his grounds of objection being that he had no taxable income. The objections having been disallowed, the appeal came on for hearing in the Supreme Court of Tasmania before *Ewing* J., who on 25th August 1922 stated a case for the opinion of this Court. The decision of this Court on that case was that Statutory Rule 1918, No. 315, was beyond the legislative powers of the Commonwealth (see *Cameron* v. *Deputy Federal Commissioner of Taxation (Tas.)* (1)). The appeals, having been remitted to the Supreme Court, came on for hearing before *Ewing* J. in September 1923, when evidence was heard and received, subject to objection by the appellant's counsel that no evidence of value of live-stock was relevant or admissible except evidence of values prescribed in accordance with secs. 14 (*a*) and 65 of the *Income Tax Assessment Act* 1915-1921. The learned Judge found on the evidence that in each of the years in question, if any tax were payable at all, the excess in value as determined by the respondent of live-stock, other than stud stock, owned and not disposed of by the appellant at the end of each of the said years respectively over the value as determined by the respondent of live-stock, other than stud stock, owned and not disposed of by the appellant at the beginning of each of the said years respectively was not excessive. I take this to mean that the excess in value as determined by the respondent in each case was no greater than the actual excess in value at the relevant time.

On this finding the following questions were submitted for the determination of this Court, :—(1) Should the excess in value of live-stock (other than stud live-stock) owned and not disposed of by the appellant at the end of each of the said years over the value of live-stock (other than stud live-stock) owned and not disposed of by the appellant at the beginning of each of the said years be taken into account in computing the income of the appellant derived from personal exertion in each of the said years for the purposes of the said Act ? (2) If yes to question 1, how should the value of such live-stock (other than stud live-stock) be arrived at ?

(1) (1923) 32 C.L.R. 68.

Sec. 14 (*a*) of the *Income Tax Assessment Act* 1915-1918 is in the words following :—" The income of any person shall include profits derived from any trade or business and converted into stock-in-trade or added to the capital of or in any way invested in the trade or business : Provided that for the purpose of computing such profits the value of all live-stock, produce, goods and merchandise (not being plant used in the production of income) not disposed of at the beginning and end of the year in which the income was derived shall be taken into account." By sec. 3 of that Act " value " in relation to live-stock is defined as meaning the value as prescribed. This definition of value was inserted by the *Income Tax Assessment Act* 1918, an amending Act which became law on 19th June 1918. The Act contained no express provision as to the date from which the alteration made in sec. 3 of the Principal Act should take effect, but, in view of the provisions of sec. 48, I think it is clear that it was intended to come into operation at the date of its enactment. By sec. 65 of the Act power is conferred on the Governor-General to make regulations not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for the purpose of giving effect to the Act. The *Income Tax Assessment Act* 1915-1918 was repealed by the *Income Tax Assessment Act* 1922.

Reg. 46 of the *Income Tax Regulations* 1917 (Statutory Rule 1917, No. 280), made on 24th October 1917, is in the following words, namely :—" (1) For the purpose of paragraph (*a*) of section fourteen of the Act the value of live-stock on hand at the beginning and end of the year in which the income was derived shall be calculated on the basis of the cost price of the stock. (2) The cost price of natural increase and the cost price of other stock for which the cost price cannot be stated by the taxpayer shall be deemed to be the fair average values as determined by the Commissioner. (3) Where live-stock is purchased during the year and is kept separate and apart from any other stock owned by the taxpayer, it shall be valued at purchase price at the beginning and end of each trading year during which it is retained. (4) Where live-stock, which has been purchased, is merged into and becomes part of the general flock or herd of live-stock owned by the taxpayer, the stock remaining on hand at the end of

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the trading year in which the purchases were made shall be valued at the average cost per head ascertained by taking the stock on hand at the beginning of the year at the actual cost, if obtainable, or, if not obtainable, at the average cost per head arrived at under the *War-time Profits Tax Regulations* at the beginning of the accounting period upon the income of which income tax for 1917-18 is payable, and in each succeeding year, at the average cost arrived at under this sub-regulation for the last preceding year, together with the natural increase at the fair average value as determined by the Commissioner under sub-regulation 2 of this regulation and the stock purchased during the year at the purchase price of that stock. (5) All live-stock which have died or have been killed for food during the trading year shall be valued at the average cost for the stock on hand at the end of the trading year arrived at under sub-regulation 4 of this regulation."

Statutory Rule 1918, No. 315, purported to amend Statutory Rule 1917, No. 280, by substituting, for the words " as determined by the Commissioner " in sub-reg. 2 and the words " as determined by the Commissioner under sub-regulation 2 of this regulation " in sub-reg. 4, the words " as set forth in Table III. in the Schedule," and by inserting reg. 46A, which in effect provided that in the assessment for certain specified years the value of live-stock should be the fair average value as set forth in Table III. The whole of Statutory Rule 1918, No. 315, was held to be invalid in the case above referred to.

It is common ground that both the assessments now under consideration must be made in accordance with the provisions of the *Income Tax Assessment Act* as it stood after the introduction in June 1918 of the definition of value in sec. 3. Inserting this definition in sec. 14 (*a*) the enactment reads as follows :—" The income of any person shall include profits derived from any trade or business and converted into stock-in-trade or added to the capital of or in any way invested in the trade or business : Provided that for the purpose of computing such profits the value as prescribed of all live-stock, and the value of all produce, goods and merchandise (not being plant used in the production of income) not disposed

of at the beginning and end of the year in which the income was derived shall be taken into account."

The appellant contends that on the true construction of this section the only value that is to be taken into account in the case of live-stock is the value as prescribed, that the expression " value as prescribed " means " value as shall be prescribed," that since the amendment of the Act no value has been prescribed by the Act itself or by any valid regulation made under it, and that it follows that there is nothing which should be taken into account in respect of the value of his live-stock. The respondent says that the expression " value as prescribed " means as prescribed either before or after the date of the amendment, that the regulations of 1917 prescribed a value within the meaning of the Act, and that the assessment should be made in accordance with those regulations. Alternatively he contends that, if no value has been prescribed, the real value should be taken into the account, and that the Judge has found that on that footing the amounts included in the assessment are not excessive. The appellant replies that the regulations of 1917, even if unaffected by Statutory Rule 1918, No. 315, are invalid as being inconsistent with the provisions of the Act under which they were made. To this the respondent says that even if these regulations were originally invalid they were validated by the amending Act of 1918.

The first question for consideration is what meaning is to be given to the expression " value as prescribed " in the proviso to sec. 14 (*a*) ? It may conceivably mean either (a) true value ascertained according to a prescribed method or (b) an artificial or arbitrary sum which is to be deemed to be the value. I think it is clear that, in the setting in which the expression is found, the latter is its true meaning. Otherwise the amendment of the Act for the purpose of introducing the words " value as prescribed " would have been unnecessary ; for power to make regulations prescribing the method to be adopted for the purpose of ascertaining the true value already existed by virtue of sec. 65 of the Act as it stood before the amendment of 1918. The section as amended draws a distinction between all live-stock on the one hand and all produce, goods and merchandise on the other. It is the value—i.e., the real value at

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the relevant times—of the produce, goods and merchandise which is to be taken into account; but it is the value "as prescribed" of the live-stock. The object of the amendment is apparent—it was to relieve the Commissioner of the obligation to ascertain the true value on the relevant dates of the live-stock of all stock owners in Australia and to authorize the substitution for the true value of a standard or arbitrary amount at which live-stock should be valued for the purpose of ascertaining the profit made by their owners. This object could not be attained by any provision which did not enable an arbitrary or artificial value to be fixed, and in my opinion the distinction drawn between live-stock and other commodities shows that it was the "value as prescribed," and that alone, which was to be taken into account in the case of live-stock.

Assuming this to be so, the next question is whether the words "as prescribed" mean "as shall be prescribed" or "as shall have been or shall be prescribed." When, as in this case the enactment gives power to prescribe rules on a particular subject matter as to which no power to prescribe rules previously existed, I think the natural meaning of the expression "as prescribed" is "as shall be prescribed"—it points naturally to the future exercise of the power which is given by the enactment and not to a previous unauthorized prescription. But sec. 9 of the *Acts Interpretation Act* 1904 provides that in any Act unless the contrary intention appears "prescribed" means prescribed by the Act or by regulations made under the Act. It was admitted that no valid regulations prescribing a value had been made after the passing of the amending Act of 1918, but it was said that a prescription of value was to be found in the Act, i.e., the *Income Tax Assessment Act* 1915-1918. I can find in that Act no provision of any kind touching the value or the methods of ascertaining the value of live-stock except sec. 3 and sec. 14. I confess I am unable to understand how the provisions of those sections, or indeed of any other provisions of the Act, can be said to prescribe expressly or by necessary implication the value to be attributed to live-stock for the purposes of sec. 14. In the view which I take of the meaning and effect of the definition of "value" contained in sec. 3, when incorporated in sec. 14, the result of the absence of any provision in the Act or in any valid regulations made

after the passing of the amending Act of 1918 prescribing the value of live-stock is that question 1 should be answered in the negative.

It was, however, argued for the respondent that the regulations of 1917 were originally valid, and must in consequence of the invalidity of Statutory Rule No. 315 of 1918 be treated as remaining in force unamended and as prescribing the value of live-stock within the meaning of the Act. But even on the assumption that the phrase "value as prescribed" should be held to extend to valid regulations made before the Act was amended, the result would be the same, for, in my opinion, the regulations of 1917 were not authorized by the Act as it stood at the time when they were made. Before the amendment made by the Act of 1918 it was the value—i.e., the real value—of the live-stock at the relevant time that was to be taken into account. The regulations of 1917 provide (*inter alia*) that the value of live-stock on hand at the beginning and end of the year shall be calculated on the basis of the cost price of the stock and that, when the cost price cannot be ascertained or stated, it shall be deemed to be the fair average value as determined by the Commissioner. Now, the cost price of live-stock affords no basis for ascertaining, and has no necessary or fixed relation to, its value at a date other than that on which it was purchased. The fact that sheep were bought in January at twenty shillings a head affords no basis for ascertaining their value either on the next succeeding 30th June or on the 30th June in the following year. The latter values are or may be affected by many causes—the price of wool, the price of meat for local consumption or for export, or the nature of the season. The value of live-stock in January of any year may be, and notoriously often is, substantially less or substantially greater than their value in June of the same year.

There is nothing in the Act as it stood before the amendment of 1918 to justify a regulation substituting, as does reg. 46 (1), cost price for actual value or a regulation empowering the Commissioner, as does sub-reg. 2, to determine the fair average value of live-stock the cost price of which it may be difficult or impossible to ascertain. It is apparent from the terms of the Statutory Rule in question that it was intended to confer on the Commissioner power, not merely to assess the true value of the live-stock, subject to correction by

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the appellate tribunal on the question of fact, but to determine finally and conclusively what was the fair average value; for, if the regulations meant no more than that the Commissioner in making the assessment was to take the live-stock in at what in his opinion was its true value, they were wholly unnecessary, the duty of the Commissioner apart from the regulations being so to assess the value of live-stock. It was suggested in argument that, even if the regulations of 1917 were originally invalid, they were either validated or adopted by the amending Act of 1918. The only provision of the amending Act which was relied on as having this effect was sec. 2 (*j*), which introduced into sec. 3 of the principal Act the definition of value. I can find no provision in the amending Act which expressly or by necessary implication indicates that Parliament intended either to validate or to adopt the regulations of 1917. In the absence of any such provision, I do not think the intention to validate or adopt invalid regulations should be attributed to the Legislature. It is clear from sec. 47 of the Act that when the intention to validate previous irregular action existed no difficulty was found in expressing that intention.

For the reasons I have stated, my conclusion is that, having regard to the amendment introduced by the Act of 1918, the absence of any valid regulation or statutory provision prescribing the value of live-stock precludes the Commissioner from taking into account any sum in respect of the excess in value of the live-stock owned by the appellant at the end of either of the years in question over its value at the beginning of such year.

The answer to question 1 should, in my opinion, be "No"; and on that footing question 2 cannot be answered.

My brother *Gavan Duffy* desires me to say that he agrees with the answers which I have proposed.

ISAACS J. This case arises under a statute now repealed, but by force of sec. 8 of the *Acts Interpretation Act* 1901 preserved in respect of obligations incurred under it prior to its repeal.

The question we have to determine depends upon the legal effect of sub-sec. (*j*) of sec. 2 of Act No. 18 of 1918, the *Income Tax Assessment Act* 1918. By that provision sec. 3 of the *Income Tax*

Assessment Act 1915-1916 was amended "by inserting at the end thereof the following definition: '"Value" in relation to live-stock means the value as prescribed.'" The first step in order to determine the legal effect of that amendment is to ascertain its meaning.

By sec. 9 of the *Acts Interpretation Act* 1904 it is enacted: "In any Act, unless the contrary intention appears, . . . 'prescribed' means prescribed by the Act, or by regulations under the Act." "The Act" in that provision, in relation to the present case, means the *Income Tax Assessment Act* 1915-1918. To that Act, therefore, we have to look to ascertain the force of the word "prescribed." The Act nowhere expressly prescribed "value" either in relation to live-stock or any other property. But by sec. 65 it was enacted: "The Governor-General may make regulations not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for giving effect to this Act and for prescribing penalties not less than one pound nor more than twenty pounds for any breach of the regulations." It is evident, therefore, that when the Legislature used the expression "value as prescribed" it meant prescribed by regulation under sec. 65. But, further, the amendment was limited to value "in relation to live-stock." That requires reference to par. (*a*) of sec. 14 of the Act—a paragraph left untouched, although sec. 14 was otherwise amended in several respects. Par. (*a*) of sec. 14, with the governing words of the section, runs thus:—"The income of any person shall include (*a*) profits derived from any trade or business and converted into stock-in-trade or added to the capital of or in any way invested in the trade or business: Provided that for the purpose of computing such profits the value of all live-stock, produce, goods and merchandise (not being plant used in the production of income) not disposed of at the beginning and end of the year in which the income was derived shall be taken into account." The words "the value," unqualified by any words of limitation or definition, there had their ordinary and primary meaning in such a business connection, and meant the actual value ascertained by the usual method of applying business considerations in relation to the respective appropriate periods. Moreover, it meant the same thing for "live-stock, produce, goods and

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merchandise" alike. Since Parliament by the amendment under consideration limited the expression "value as prescribed" to "live-stock," leaving value in relation to "produce, goods and merchandise" as it was, it is obvious that Parliament regarded the latter value as not "prescribed" by the mere words of par. (*a*) of sec. 14.

The result, so far, is that the amendment of sec. 3, that "value in relation to live-stock, means the value as prescribed," meant that by "value" in par. (*a*) of sec. 14, so far as it related to live-stock, was intended "value as prescribed by regulation under sec. 65." That is to say, the standard of "value" itself was to be prescribed, and not that the method of ascertaining the ordinary business value was to be prescribed. One view, therefore, presented by the Crown —that in the absence of express regulation the value of live-stock was sufficiently "prescribed" by sec. 14, par. (*a*)—cannot be maintained.

The meaning of the amendment being so ascertained, the question is what was its legal effect? Its legal effect was that no value of live-stock undisposed of at the beginning and end of the year could be taken into account for the purpose of computing the profits under par. (*a*) of sec. 14, except the "value as prescribed," that is, by regulation. Was there then at the date of the repeal of the Act of 1915-1918 any regulation in force prescribing the value of live-stock of the class described in the proviso to par. (*a*) of sec. 14? The Crown contends that reg. 46 of Statutory Rule 1917, No. 280, as originally made on 24th October 1917, was a sufficient regulation prescribing the value of live-stock under the relevant paragraph. It also contends, and this is not contested or controvertible, that the attempted amendment of reg. 46 by Statutory Rule 1918, No. 315, reg. 1, is null and void, because inseparable, and therefore wholly invalid for the reasons given in *Cameron* v. *Deputy Federal Commissioner of Taxation* (*Tas.*) (1). Reg. 46 must therefore be considered as originally framed. Mr. *Keating*, in his short but effective argument, contended that, as reg. 46 was made before the amending Act, its validity must be judged of by the law then in force, and that, judged by that standard, the regulation was invalid because it

(1) (1923) 32 C.L.R. 68.

purported to prescribe a standard inconsistent with that enacted by sec. 14 (*a*) itself. The inconsistency urged was that, whereas the section provided for the actual value, whatever that might be, to be provisionally ascertained by the Commissioner and ultimately, if disputed, determined by the Court, the regulation peremptorily provided, in such a case as the present, for " the fair average values as determined by the Commissioner." It is manifest, if that be the standard, as the regulation unquestionably declares, that the function of the Court on appeal would be limited to ascertaining what the Commissioner had determined to be the fair average value. The doubt I intimated on the previous occasion (1) thus requires direct decision. Sir *Edward Mitchell* strongly pressed upon us that this was not prescribed as the standard, but merely as a provisional arrangement which, on appeal, did not prevent the Court from proceeding to find the actual value. To the difference between the two positions I adverted at p. 77 of the previous report. But, in the first place, I am unable to accept the view of provisional arrangement as a matter of construction of the regulation itself.

It is well, perhaps, to state very shortly how, as I understand, the regulation would operate. The opening words make it apply to all live-stock dealt with under par. (*a*) of sec. 14 of the Act. Although the live-stock with which this case is concerned come specially under sub-reg. 2, it is necessary first to read sub-reg. 1, which is the general provision. We have to envisage a station with a number of live-stock upon it, which were there at the beginning of the year and which remained at the end of the year. Sub-reg. 1 says then, by way of general application, that " value " is to be " calculated on the basis of the cost price of the stock." To the words " calculated " and " basis," the only intelligible meaning that can be given is that you ascertain the cost price of the various animals, it may be singly in some cases or in herds or flocks in other cases, and the sum total of the calculation is the " value." Apart from the special cases dealt with in the subsequent sub-regulations, this process determines the " value." But in the case of some of the stock—either natural increase or stock of which for some other reason cost price cannot be stated—

(1) (1923) 32 C.L.R., at p. 75.

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another standard is necessarily adopted. Taking that particular stock apart from the rest, the Commissioner "determines," that is, estimates, their average values, so far as they are concerned, substituting that "determined average value" for "cost price"; that is, substituting one *formula* for another, you multiply the average value by the number of that particular stock and you thus arrive at one factor in the total process required by sub-reg. 1. Sub-reg. 1 then is satisfied partly by what is done under sub-reg. 2 and partly by what is done under sub-reg. 1 itself. Sub-regs. 3 and 4 relate to purchased stock dealt with in specific ways, and are likewise modifications *pro tanto* of sub-reg. 1. It may be necessary to apply in a given case every sub-regulation of reg. 46, the whole being one combined scheme. Now, that scheme is not provisional but determinate for the very purpose of arriving at the statutory result, and the final result so arrived at is intended to be the "value as prescribed." But I would point out that, if the contention were correct that reg. 46 does not finally prescribe the value for the purposes of par. (*a*) of sec. 14, then there is no prescribed value at all; consequently, as to live-stock there is no statutory "value" that a Court can recognize unless a further view advanced by Sir *Edward Mitchell* be accepted. That further view was in effect this: That at the date of the passing of the amending Act (19th June 1918) there was in *de facto* existence the 46th regulation, and that the words "value as prescribed" should be read as "value as already in fact or in future in law prescribed." But in my opinion that construction cannot be accepted. "Prescribed" naturally means "lawfully prescribed," whenever it is necessary to apply the provisions of sec. 14 (*a*) to live-stock. There are no words of validation or adoption of the *de facto* reg. 46, such as are found in sec. 47 of the amending Act with respect to certain administrative deductions mentioned. And sec. 48 of the Act of 1918 leads to the clear conclusion that par. (*j*) of sec. 2 of that Act is not to be retroactive.

The matter then is reduced to this:—The Act of Parliament directed that the prescribed value of live-stock undisposed of during the relevant year should be brought into the computation for either increasing or decreasing the profits otherwise ascertained. There

is no prescribed value for the relevant year and, as it would be legislation, not judicial interpretation, to substitute any other standard of value, the live-stock in question must be disregarded for the purpose.

The answer to the first question should be in the negative, and that renders it unnecessary to answer the second.

RICH J. I agree that the first question stated in the special case should be answered in the negative, and that it is therefore unnecessary to answer the second question categorically, although it is in effect answered by the reasons for answering the first.

In the amending Act of 1918 the Legislature clearly intended to draw a distinction between the nature of the value to be computed with reference to the proviso to sec. 14 (*a*) according as the property was live-stock or was other personal property. The value of other personal property was left as it then stood by previous law, but the value of live-stock was in future to be "as prescribed." This distinction connotes that the then existing law had not so far "prescribed" any value. Some new act, either legislative or executive, was needed to prescribe the value of live-stock, unless there existed in reg. 46 a valid prescription. The Statutory Rule of 1918 did not validly amend reg. 46, as it had hitherto existed. In my opinion that regulation, on its proper construction, attempts to create a factitious value inconsistent with "the value," i.e., the real value required by sec. 14 (*a*). Reading the regulation as a whole, it provides in clause 1 a primary scheme which may or may not prove sufficient for all the live-stock for the year. If, however, there happen to be live-stock of the specified character mentioned in clauses 2, 3 and 4, their respective values have to be ascertained in the special manner provided for each class. Those clauses are only possible variations of the first. But when finality has been reached the prescribed value is obtained. That, being clearly something inconsistent with the "value" in the Act, was *ultra vires* of sec. 65. It was therefore invalid when it was passed, and, as I cannot read the amending Act as validating it, it remained invalid.

There is, therefore, no Act of Parliament, and in law no regulation,

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to satisfy the words " value as prescribed " with regard to live-stock.

For these reasons I am of opinion that the question should be answered as I have already stated.

STARKE J. I am unable to assent to the judgment of the Court in this case. The taxpayer has been assessed to income tax for the financial years ending on the 30th days of June of 1919 and 1920 respectively. There has been included in these assessments the excess in value of live-stock bred and raised by the taxpayer and owned and not disposed of by him as on the 30th days of June 1918 and 1919 respectively, over the value of live-stock bred and raised and owned and not disposed of by him as on the 1st days of July 1917 and 1918 respectively, that is, for the periods of twelve months preceding the financial years for which the taxpayer was assessed. The Commissioner determined these values, and he originally justified the assessments under the *Income Tax Assessment Act* 1915-1918, sec. 14 (*a*), and the Statutory Rule 1918, No. 315. But the Rules of 1918 contravened the Constitution, and have been declared invalid (*Cameron* v. *Deputy Federal Commissioner of Taxation (Tas.)* (1)). The Commissioner, therefore, has fallen back upon the Act and the Statutory Rule 1917, No. 280, reg. 46. The regulations of 1918 purported to come into operation on 15th December 1915, and were expressly applied to assessments for the financial years 1917 and 1918, and apparently were intended to cover all subsequent assessments. But an unconstitutional law or regulation is a futile attempt at legislation, and " is, in legal contemplation, as inoperative as though it had never been passed " (*Norton* v. *Shelby County* (2)).

The taxpayer now attacks the regulations of 1917, and contends, in the first place, that reg. 46 of those regulations is not warranted by the power conferred upon the Governor-General by the *Income Tax Assessment Act*, sec. 65, to make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed or are necessary or convenient to be prescribed for the purpose of giving effect to the Act. A tax was levied, at the time of the passing of the 1917 regulations, upon

(1) (1923) 32 C.L.R. 68.

(2) (1886) 118 U.S., at p. 426.

income, and the "income" of a person included profits derived from any trade or business. But the Act further provided that, for the purpose of computing the profits of a taxpayer's business the *value* of all live-stock not disposed of at the beginning and end of the year in which the income was derived should be taken into account (see secs. 10 and 14). Any regulation authorizing an assessment of live-stock based upon any other consideration than the real and actual value of the live-stock at the appropriate dates was necessarily inconsistent, so it was argued, with the Act, and therefore unwarranted in point of law. Conceding this proposition, I proceed to examine the regulations.

The value of live-stock is to be calculated on the basis of the cost price of the stock (reg. 46 (1)). But to adopt that basis is not to infringe the Act: the provision contemplates the ascertainment of the real value from the basis of the cost price. Again, clause 2, which is the provision appropriate to this case, prescribes that the cost price of natural increase shall be deemed to be the fair average value as determined by the Commissioner. An average is simply the mean of several amounts, and this provision means, I should think, the fair values of the stock referred to, at the average or mean amount of the several values. There is nothing contrary to the Act in that: it gives the real and actual value of the increase. It is said, however, that the addition of the words "as determined by the Commissioner" invalidates the provision, for it substitutes the determination of the Commissioner for the standard set up by the Act. Surely, however, it is usual to so construe a regulation as to support rather than destroy it. It is the duty of the Commissioner to make assessments, and he must, in the course of that duty, come to some determination upon the question of values, subject to appeal to the Courts under sec. 37. The words recognize, in my opinion, the administrative duty of the Commissioner and simply mean as determined by the Commissioner in pursuance of his duty under the Acts. The determination would thus be subject to review in the Courts of law, and the action of the Commissioner in making it would be quite consistent with the Act.

The provisions of clause 3 deal with the case of live-stock purchased and kept apart from other stock owned by the taxpayer, and those

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of clause 4 with the case where live-stock has been purchased and merged in the general flock or herd of the taxpayer. I do not feel called upon to express any opinion upon the validity of these clauses, because that matter was not argued, and also because their invalidity —supposing them invalid—would not, in my opinion, bring down a legitimate provision for the determination of the value of natural increase. They deal with specific cases, and are independent of and severable from the provisions in clauses 1 and 2.

Another curious point arises in this case. After the passing of the 1917 regulation, an Act was passed in 1918 declaring that value in relation to live-stock "means the value as prescribed." If the 1917 regulation be invalid, then, it is urged, no value has been prescribed either by the Act or by any regulation. The argument appears to be sound. And it cannot be cured, because, by reason of the repeal of the *Income Tax Assessment Act* 1915-1918 by the Act No. 37 of 1922, the power to prescribe values for live-stock for the periods in question in this case has ceased to exist. But as to the stock in question—the stock bred and raised by the taxpayer—the provisions of reg. 46 (2) do, in my opinion, prescribe or recognize a value, namely, the fair values of the stock averaged as directed by the regulation.

Question 1 *answered No.*

Solicitors for the appellant, *Rylah & Anderson* for *H. Bushby*, Launceston.

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

B.L.