[HIGH COURT OF AUSTRALIA.]

DALRYMPLE . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . RESPONDENT.

H. C. OF A. 1924.

MELBOURNE, *May* 28; *June* 10.

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

Income Tax—Assessment—Income—"Payment received by a lessee upon the assignment or transfer of a lease"—Deduction of part attributable to transfer of any "assets" belonging to lessee—Income Tax Assessment Act 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *sec.* 14 (*d*).

Held, that the effect of sec. 14 (*d*) of the *Income Tax Assessment Act* 1915-1918, so far as it relates to payments received by a lessee upon an assignment or transfer by him of the lease, is to include in the lessee's income only so much of such payments as is not part of the consideration for the assignment or transfer of the lease itself or of the consideration for the purchase or other acquisition from the lessee of some specific property other than the lease.

The taxpayer sold a station property in Queensland, which was held on a lease from the Crown the unexpired term of which was twenty-six years, with all stock, plant, furniture, stores, &c., thereon, for £120,000, of which £60,000 was payable in instalments over a period of years. By the terms of the agreement £20,060 of the purchase price was apportioned to the lease.

Held, that no portion of the sum of £20,060 was liable to taxation as income of the taxpayer, none of it being attributable to anything but the lease itself.

CASE STATED.

On an appeal to the High Court by William Dalrymple from an assessment of him by the Federal Commissioner of Taxation for income tax for the year 1917-1918, *Starke* J. stated a case, which was substantially as follows, for the opinion of the Full Court:—

1. William Dalrymple (hereinafter called the taxpayer) carried

H. C. OF A. 1924.

DALRYMPLE v. FEDERAL COMMISSIONER OF TAXATION.

on the business of a pastoralist at Llanrheidol Station, situate near Winton in Queensland, for many years prior to 31st May 1918, on which date he ceased to carry on such business.

2. The said station from in or about the year 1870 was held on lease from the Government of the State of Queensland, and on 31st March 1918 the unexpired term of such lease was twenty-six years.

3. At no time did the taxpayer traffic in land or in interests in land or carry on the buying and selling of such property as part of his ordinary business.

4. By agreement under seal dated 25th March 1918 the taxpayer sold the said station, together with all stock thereon and all plant, furniture, stores, chattels and effects (with certain exceptions in the said agreement specified) upon and belonging thereto, for the sum of £120,000.

5. The purchaser under the said agreement took possession of the said station on 31st March 1918, and has since paid to the taxpayer the respective sums amounting in all to the said sum of £120,000 in the manner and on the dates as in the said agreement provided.

6. By a notice of assessment dated 6th September 1921, as subsequently amended by two several notices of amended assessment dated respectively on 16th June 1922 and 4th September 1922, the taxpayer was assessed for income tax by the Deputy Federal Commissioner of Taxation (hereinafter called the Commissioner), in respect of the period commencing on 1st July 1917 and ending on 30th June 1918, on (*inter alia*) the sum of £17,400 as the profit on the sale of the lease of the said station, which said amount was obtained by deducting from the sum of £20,060 in cl. 1 of the said agreement mentioned the sum of £2,660, which was the amount which, in the opinion of the Commissioner, was properly attributable to the period of the lease unexpired at the date of the said agreement.

7. The taxpayer, being dissatisfied with the said assessment on the said sum of £17,400, duly lodged objections in writing thereto, which said objections were disallowed by the Commissioner; and the taxpayer thereupon appealed to the High Court pursuant to the provisions of sec. 37 (4) of the *Income Tax Assessment Act* 1915-1918.

8. The Commissioner ascertained that the purchase price of the said station was payable in instalments, and that only £60,000 thereof was received by the taxpayer during the period commencing on 1st July 1917 and ending on 30th June 1918; and the Commissioner accordingly on 1st May 1924 issued a further notice of amended assessment, by which the taxpayer was assessed for income tax in respect of the said period on (*inter alia*) the sum of £8,700, being one-half of the sum of £17,400 aforesaid in lieu of the said prior assessment on the said sum of £17,400.

9. The taxpayer died on 5th November 1923, and the executors of his will and the Commissioner agreed that this appeal should be deemed to be an appeal by the said executors from the assessment as last amended.

10. The said appeal to the High Court having been lodged prior to the said 1st May 1924, the said executors expressed their desire to lodge objections in writing to the assessment as last amended and to appeal therefrom, if such objections were disallowed by the Commissioner, but the Commissioner waived the lodgment of objection, and it was agreed between the said executors and the Commissioner that the said appeal should be treated as an appeal also from the last-mentioned assessment of 1st May 1924.

11. Such appeal coming on for hearing before me, I state this case for the opinion of the High Court upon the following question of law:

> Did the said sum of £8,700, or any and what part thereof, form part of the assessable income of the taxpayer derived during the period of twelve months ending on the 30th day of June 1918?

By the agreement, which was part of the case stated, it was agreed (cl. 1) that the purchase price should be apportioned in the following manner:—66,000 sheep at 20s. per head, £66,000; 90 cattle at £6 per head, £540; 130 horses at £10 per head, £1,300; plant, furniture, stores, £6,100; improvements, £26,000; for the leasehold area, £20,060. It was also agreed that the purchase price should be paid as to £1,000, by way of deposit on the signing of the agreement; as to £59,000, on 3rd April 1918; and as to the

H. C. OF A. 1924.

DALRYMPLE v. FEDERAL COMMISSIONER OF TAXATION.

balance of £60,000, by five equal yearly instalments payable on 31st March of 1919 and the four following years.

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

Pigott, for the respondent.

Cur. adv. vult.

June 10.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. On 25th March 1918 William Dalrymple, by agreement under seal, sold the Llanrheidol Station in Queensland. The agreement, among other things, included the sale of the unexpired term of a lease of the station land, the price of which was fixed at £20,060. The Deputy Federal Commissioner of Taxation, in respect of the period commencing on 1st July 1917 and ending on 30th June 1918, assessed Mr. Dalrymple on a sum of £17,400, made up by deducting from the £20,060 the sum of £2,660, being the amount which in his opinion was properly attributable to the period of the lease unexpired at the date of the agreement. The assessment was afterwards altered so as to charge the taxpayer in respect only of so much of the said sum of £20,060 as, in the opinion of the Commissioner, had been received by the taxpayer during the accounting period. The taxpayer appealed against the first assessment, and died on 5th November 1923; and the matter now comes before us by way of a special case stated on an appeal against the amended assessment by the executors of the will of the taxpayer. The question at issue depends on the meaning of sec. 14 (*d*) of the *Income Tax Assessment Act* 1915-1918, which is as follows : " Money derived by way of royalty or bonuses, and premiums fines or foregifts or consideration in the nature of premiums fines or foregifts demanded and given in connection with leasehold estates, and the amount of any payment received by a lessee upon the assignment or transfer of a lease to another person after deducting therefrom (i.) the part (if any) which, in the opinion of the Commissioner, is properly attributable to the transfer of any assets belonging to the lessee : and (ii.) so much of any fine

premium or foregift paid by the lessee or any amount paid by the lessee for the assignment or transfer of the lease as, in the opinion of the Commissioner, is properly attributable to the period of the lease unexpired at the time of the assignment or transfer by the lessee."

The Commissioner took the sum of £20,060 as the amount of the payment received by a lessee upon the assignment or transfer of a lease, and deducted therefrom the sum of £2,660 as so much of that amount as was properly attributable to the period of the lease unexpired at the time of the assignment or transfer by the lessee within the meaning of sub-cl. (ii.) of cl. (*d*). We think that this process is not that prescribed by the statute. The language of the clause is not easy to interpret; but, in our opinion, the words "the amount of any payment received by a lessee upon the assignment or transfer of a lease to another person" are not confined to money constituting the consideration for an assignment or transfer of a lease, but are intended to describe all sums of money paid on the occasion of and in connection with an assignment or transfer including the consideration for such assignment or transfer. From this gross sum is to be deducted, under sub-cl. (i.), such portions as in the opinion of the Commissioner are properly attributable to the transfer of any assets belonging to the lessee including his interest in the lease. The word "transfer" in sub-cl. (i) appears to us to be a generic term intended to designate any conveyance effecting a change of property in chattels or the change of property itself. The word "assets" in our opinion does not include the right which a tenant has to consent to or to refuse to consent to an assignment. The remainder would disclose everything received by the lessee from any person whatever outside the bare consideration for such transfer. But the lessee may himself have paid to the lessor part of what he has received or something out of his own pocket. This would reduce the amount of his profit in the transaction, and should be deducted under sub-cl. (ii.). The result of these calculations shows the amount in respect of which the lessor is assessable under the clause. The object of the first part of the clause is to include in the income of a lessor all sums paid by a tenant other than the rent reserved by the lease, such as sums which are demanded on the

H. C. OF A. 1924.

DALRYMPLE v. FEDERAL COMMISSIONER OF TAXATION.

Knox C.J. Gavan Duffy J. Starke J.

renewal or surrender of a lease or on the giving of a new lease. The second part of the clause attempts to apply a similar rule to the case of a lessee, and to include in his income all sums which cannot be identified as part of the consideration for the assignment or transfer of the lease itself, or of the consideration for the purchase or other acquisition from the lessee of some specific property other than the lease. Money paid by the incoming tenant of an hotel for the furniture of the outgoing tenant, and money paid by the landlord to the tenant to induce him to make the assignment or transfer of the lease, would both be included in the phrase "amount of any payment received by a lessee," but the first sum should, and the second should not, be deducted under the provisions of sub-cl. (i.) as properly attributable to the transfer of an asset belonging to the lessee.

For the reasons we have given, the answer to the question submitted for our consideration must be No.

ISAACS J. It is important, as the case must not be treated as raising a merely hypothetical question, that some salient facts should be pointed out. William Dalrymple leased a station from the Queensland Government, and on 31st March 1918 the unexpired term of the lease was twenty-six years. On 25th March 1918 Dalrymple sold the station and all stock and other personal property for a lump sum of £120,000 payable by instalments. On 31st March 1918 the purchaser took possession. Although the total price was a lump sum, it was agreed between the parties how it was made up—by apportioning it to sheep, cattle, horses, plant, improvements and, lastly, to the leasehold area, the latter being fixed at £20,060. Portion of the purchase-money, namely £60,000, has been paid.

The Commissioner has fixed £8,700 as the gross amount properly attributable to the "leasehold area" for the financial year now in question. The Commissioner took as a starting-point the £20,060, and deducted from it, under sub-cl. (ii.) of cl. (*d*) of sec. 14 of the Assessment Act, as "the amount which, in the opinion of the Commissioner, was properly attributable to the period of the lease unexpired at the date of the said agreement." Before us the

Commissioner did not seek to retract this deduction, but adhered to the sum of £8,700, being one-half the difference obtained by subtracting £2,660 from £20,060. The sum of £8,700 was accepted so far as a basis for our determination. The question is whether that sum or some, and what, part of it forms part of the "assessable income" of the taxpayer for the relevant period. This involves the construction of cl. (*d*) above mentioned. Its history is not unimportant, because it enables us to trace the mind of the Legislature more clearly. When examined carefully, the clause is simply directed to bringing into "assessable income" all moneys having the character of profit made by or on behalf of lessors or lessees in connection with the leases they have made or hold, and not as the produce or equivalent of property transferred, but for the mere exercise of power in respect of the property. The history of the enactment is briefly told. Until 1916 it ran thus: "money derived by way of royalty or from bonuses, premiums, fines, or foregifts demanded and given in connection with leasehold estates." In December 1916, by sec. 5 (*b*) of Act No. 39, the rest of the words now appearing in cl. (*d*) of sec. 14 of the Act 1915-1918 were added. In 1918, by sec. 8 of Act No. 18, the whole clause was re-enacted verbatim, but subdivided for clarity.

There can be no doubt that the whole clause is directed to the same class of income, namely, income, not the produce of leasehold property, but arising collaterally through the ownership of leasehold property. The earlier part was confined to moneys received by a lessor in connection with leasehold estates and having the common characteristics of money or money's-worth demanded and paid as a condition of granting or consenting to a lease or the assignment of a lease. That the law regarded as a "profit." In *Waite* v. *Jennings* (1) *Fletcher Moulton* L.J. said: "Now it is evident that an unqualified covenant not to assign without consent may be turned from a protection to a lessor to a means of profit to him, if money or money's-worth can be demanded as a condition of granting the consent." The Lord Justice reaffirmed that in *Andrew* v. *Bridgman* (2). That is simply turning bare power into profit. The various Conveyancing Acts in England in 1892, and in Australia since,

(1) (1906) 2 K.B. 11, at p. 17.

(2) (1908) 1 K.B. 596, at p. 599.

H. C. OF A. 1924.

DALRYMPLE v. FEDERAL COMMISSIONER OF TAXATION.

Isaacs J.

provide that unless there is express provision to the contrary a lessee need not in such case pay a fine, which includes premium or foregift, and any payment, consideration or benefit in the nature of a fine, premium or foregift. Nevertheless, such a payment is not illegal, and if paid cannot be recovered back. Such a payment, whether there be express provision for it or not, is declared "income." That principle is, by the amending legislation, extended to assignments and transfers.

"Assignment or transfer" is an expression which excludes the idea of rent, because it connotes a bulk sum consideration. But it may and in many cases does include in that sum an amount demanded by the lessor, or it may include in certain circumstances a sum demanded by a lessee having all the elements of a premium or bonus, and yet necessarily included in the price paid by the assignee. From the total sum demanded of the assignee and paid by him the Legislature's problem was to disentangle the money properly representing the agreed equivalent of property, including whatever profit the assignor could make, on the one hand, and money not representing property, but representing rather some power which he possessed by reason of his position in relation to the property and analogous to the power of the lessor in demanding a fine.

The problem is solved in this way:—The whole "amount of any payment received by a lessee upon the assignment or transfer of a lease to another person" is ascertained. That total bulk sum is taken as the datum figure. It is not as such the taxable sum. It is only the first factor because of the words "after deducting therefrom." It awaits the application of the rest of the clause before anything can be predicated of it. It may be that the datum figure will eventually stand as the final figure. That will depend upon the facts. That would be so, if the amount received from the purchaser by the lessee were (say) £100 and the circumstances such that no assets but the unexpired lease belonged to the lessee, and as to the unexpired lease it was not really taken into consideration. A licensee of an hotel heavily in debt and whose licence was in peril might afford a ready instance. But the datum figure may be reduced. By the first sub-clause the Commissioner has to see how much is

" properly attributable to . . . assets belonging to the lessee." That is, he has to look at " assets," not, as I think, any class or classes of assets in particular, but *property* indiscriminately of whatsoever class or kind. Then the " assets " must be those *belonging to the lessee.* For instance, no interest of the lessor can be considered. The portion (if any) of the datum figure so found by the Commissioner is deducted from it. That is the first step in arriving at the " income " that is to be brought into account. I may add that the portion to be so deducted is irrespective of whether it is the true " value " of the assets. Value may be very important as an element in arriving at the result; but it is only evidentiary, and is not the standard. The standard is the *price* really and genuinely demanded and received for all the assets of whatsoever kind which belonged to the lessee and which he transferred. His price may be exorbitant, but, if really the price of the assets, it is to be deducted in full. It is in that case simply so much capital transformed into cash, and, however great, the profit remains untaxed. It is not akin to income. The first step being finished, there may be nothing left. If there is anything left, it is *ex necessitate* the *produce not of property but of power,* and prima facie taxable in the lessee's hands. He is, however, then entitled to the next step. It may be something exacted for the lessor. The lessor may have demanded a " fine " or " bonus " for his consent, and the lessee has in the first instance extracted it from the assignee. In that case the second sub-clause may apply. If the Commissioner finds that the lessee has paid over to the lessor portion of the sum received, as being in respect of the unexpired portion of the term (and not otherwise), the lessee is *pro tanto* relieved. Apart from that, the residue is deemed income. Whatever appears as the final figure after the whole relevant portion of the clause is applied is the statutory " income." It is plain that the whole bulk sum wraps up in itself the two factors of property and power, and great difficulty exists in detecting and proving evasion. The Legislature has met this by a practical mode of treatment. Instead of a technical chain of proof, in a Court frequently impossible, it has substituted the opinion of the Commissioner as an impartial and experienced officer. When the

H. C. OF A. 1924.

DALRYMPLE v. FEDERAL COMMISSIONER OF TAXATION.

Isaacs J.

first step is completed, the lessee has a right to show how much represents what *he* and not the lessor has derived from his source of income. It may be that the lessee can show that he has in fact paid that or part of it over to the lessor. This is provided for by the second sub-clause, which, strangely enough, seems to have been misunderstood. It seems to have been taken as enabling a deduction to be made for money paid *to* the lessee. That is not so. It is confined to deductions in respect of money paid *by* the lessee *for* (not upon) the assignment or transfer of the lease, and properly limited to the unexpired period. That represents the lessor's price for consenting to the assignment or transfer for the unexpired period. To that extent the lessee is relieved, and of course by the earlier part of the clause to that extent the lessor is liable.

Now we have to apply this law to the facts. We assume that £8,700 was received as datum money by the lessee for the relevant period. What portion of that sum is it suggested was even possibly not received as "properly attributable to the transfer of any assets belonging to the lessee"? None, I should say. It can hardly be suggested that the Government of Queensland has demanded or would receive any fine or foregift, &c., as the price of its consent to the transfer, and there is no other fact suggested to indicate that the transferor received anything beyond the price of the assets. Full deduction under sub-cl. (i.) is to be made. There are no materials on which the Commissioner could form any but the necessary opinion. Then, what possible deduction under sub-cl. (ii.)? What sum is suggested as having been paid out of the purchase-money "by the lessee" to the Queensland Government for "the assignment or transfer"? The deduction has already been made in this case, in order to arrive at £8,700 as the datum figure. But I am forced to say what I have said in order to make clear my working application of the enactment to a given case. In my opinion £8,700 is not the true datum figure, though I accept its accuracy for the purpose of answering the question. The second sub-clause cannot be applied in such a case as the present until, by applying the first, a sum representing a fine, &c., is ascertained.

On the facts of this case I am of opinion the question should be

answered in the negative : No part of the sum of £8,700 forms part of the assessable income of the taxpayer for the period mentioned.

RICH J. In my opinion the question submitted should be answered in the negative.

On the facts appearing in the case stated, the whole of the money to be received by the vendor, who was the lessee of the station, was money the amount of which was arrived at as the price of his own property. The various classes of property to which respectively certain sums were allocated were specified for the purposes of the contracting parties. But one effect this distribution has, namely it shows, nothing being stated to the contrary, that the whole of the money comes within sub-cl. (i.) of cl. (*d*) of sec. 14. I am not attempting to usurp the function of the Commissioner, who might come to a different conclusion upon other materials ; but, on the material I find in the case, there is nothing to vary the effect of the distribution in the contract, that is to say, the whole amount allocated in respect of the leasehold is deductible. In the same way, I can see nothing to which the sub-cl. (ii.) of cl. (*d*) could apply, even if any balance were left, and there is none. I may say that I see no way of interpreting cl. (*d*) except literally in the manner I have applied it. I construe it as sweeping into the net all payments received by a lessee in connection with the assignment or transfer of his lease which are affirmatively found by the Commissioner not to be really payments for anything belonging to the lessee himself. Such overpayments are swept in as in the nature of fines or foregifts to the lessee in connection with his leasehold interest, and demanded not for proprietary interests but as the arbitrary price of consent.

Question answered No.

Solicitors for the appellant, *Whiting & Byrne.*

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

B. L.