[HIGH COURT OF AUSTRALIA.

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } PLAINTIFF;

AGAINST

HIPSLEYS LIMITED . . . . . DEFENDANT.

H. C. OF A. 1926.

SYDNEY, *Aug.* 3.

MELBOURNE, *Oct.* 11.

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

War-time Profits Tax—Transfer of business—Tax on profits made before transfer—Assessment of transferor after transfer—Liability of transferee—Validity of law—Law dealing with different subjects of taxation—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 55—*War-time Profits Tax Assessment Act* 1917-1924 (*No.* 33 *of* 1917—*No.* 53 *of* 1924), *secs.* 14, 25, 30, 32, 34.

A business, to which the *War-time Profits Tax Assessment Act* 1917-1918 applied, was transferred after the commencement of that Act. Subsequently to the transfer the transferor was assessed for war-time profits tax under that Act in respect of the profits of the business during several years preceding the transfer. Neither the transferor nor the transferee secured the payment of the tax so assessed to the Commissioner.

Held, by the whole Court, that sub-secs. 2 and 5 of sec. 14 of the Act authorized the making of the assessment, and that sub-sec. 5 imposed upon the transferee a personal liability to pay the tax so imposed; but, by *Knox* C.J., *Higgins* and *Gavan Duffy* JJ. (*Isaacs* and *Rich* JJ. dissenting), that the liability so imposed upon the transferee by sub-sec. 5 did not include a liability to pay the 10 per cent additional tax imposed by sec. 34 of the Act.

Boase Spinning Co. v. *Commissioners of Inland Revenue*, (1926) Sc.L.T. 307; 135 L.T. 211, applied.

Wankie Colliery Co. v. *Commissioners of Inland Revenue*, (1922) 2 A.C. 51, distinguished.

Held, also, by the whole Court, that sec. 14 (5) does not deal with a subject of taxation other than war-time profits, and therefore is not obnoxious to sec. 55 of the Constitution.

Federal Commissioner of Taxation v. *Munro*, (1926) 38 C.L.R. 153, followed.

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

CASE STATED.

In an action brought in the High Court by the Federal Commissioner of Taxation against Hipsleys Ltd., *Knox* C.J. stated a case for the opinion of the Full Court which, so far as material, was as follows :—

1. In this action the plaintiff claimed £1,909 3s. alleged to be due from the defendant for war-time profits tax and additional tax under the *War-time Profits Tax Assessment Act* 1917-1918. The action was commenced by writ issued on 17th December 1925.

2. The particulars of the plaintiff's claim are set out in the writ in the words and figures following :—War-time profits tax as assessed for the financial year 1916-1917, £208 11s. 10d. ; additional tax due under sec. 34 of the *War-time Profits Tax Assessment Act* 1917-1918 for the financial year 1916-1917, £20 17s. 2d. ; war-time profits tax as assessed for the financial year 1917-1918, £719 5s. ; additional tax due under sec. 34 of the *War-time Profits Tax Assessment Act* 1917-1918 for the financial year 1917-1918, £71 18s. 6d. ; war-time profits tax as assessed for the financial year 1918-1919, £807 15s. ; additional tax due under sec. 34 of the *War-time Profits Tax Assessment Act* 1917-1918 for the financial year 1918-1919, £80 15s. 6d. : total £1,909 3s.

3. In, and for some years prior to, the year 1920 Hipsley & Waddell Ltd., a company incorporated under the law of New South Wales, carried on in Sydney the business of ironfounders, mechanical engineers, manufacturers of machinery, brass-founders and metal workers, and other business in connection therewith.

4. By special resolution duly passed and confirmed at extraordinary general meetings of the members of the said company held respectively on 12th May 1920 and 2nd June 1920, it was resolved that the company be wound up voluntarily and that Robert Newnham be and he was thereby appointed liquidator for the purpose of such winding up.

5. The defendant was on 9th June 1920 duly incorporated under the law of New South Wales as a limited company.

9. If, and so far as, the question is one of fact, I find that the business of Hipsley & Waddell Ltd. was in the month of June 1920 transferred to the defendant.

10. Notice of assessment of the several amounts of £208 11s. 10d., £719 5s. and £807 15s., mentioned in the particulars above set out, was first given to the said Robert Newnham as liquidator of Hipsley & Waddell Ltd. on or after 18th February 1921. No notice of assessment of any of these sums was given to the defendant except that set out in par. 20 hereof.

11. On 8th March 1924 the said Robert Newnham as such liquidator lodged objections in writing against the respective amended assessments for the years 1916-1917, 1917-1918, 1918-1919, of which notice was issued on 13th February 1924.

12. The Commissioner, having considered each of the objections mentioned in the last preceding paragraph, allowed it in part and disallowed it in part, and gave written notice to the objector of his decision thereon.

13. The said Robert Newnham as such liquidator, within thirty days after service by post of notice of such decisions, asked the Commissioner to treat each objection as an appeal and forward it to the High Court, but none of the said objections has yet been so forwarded.

14. On 25th August 1924 and 2nd April 1925 respectively the plaintiff caused to be served by post on the said Robert Newnham as such liquidator documents purporting to be notices of amended assessments under the *War-time Profits Tax Assessment Act* based on profits derived during the year ended 30th June 1917.

15. On the said 25th August 1924 and 2nd April 1925 respectively the plaintiff caused to be served by post on the said Robert Newnham as such liquidator documents purporting to be notices of amended assessments under the said Act based on profits derived during the year ended 30th June 1918.

16. On 13th February 1924 and 25th August 1924 respectively the plaintiff caused to be served by post on the said Robert Newnham as such liquidator documents purporting to be notices of amended assessments under the said Act based on profits derived during the year ended 30th June 1919.

17. On 24th April 1925 the said Robert Newnham as such liquidator as aforesaid caused to be delivered to the plaintiff three documents purporting to be notices of objection to the respective

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

amended assessments contained in the notices issued on 25th August 1924 and 2nd April 1925 as mentioned in the last three preceding paragraphs hereof.

18. None of the notices of amended assessments so issued on 25th August 1924 or on 2nd April 1925 contained any alteration or addition which had the effect of imposing any fresh liability on or increasing any existing liability of the taxpayer.

19. No portion of the amounts assessed as payable by way of tax or additional tax or penalty in the said notices of assessment of 2nd April 1925 and 25th August 1924 respectively has been paid to the Commissioner, nor has payment of any portion of such tax or additional tax or penalty to the Commissioner been secured.

20. On 22nd July 1925 the plaintiff caused to be served by post on the defendant three documents purporting to be notices of assessment under the said Act based on profits derived in the business carried on by Hipsley & Waddell Ltd. during the years ended 30th June 1917, 30th June 1918 and 30th June 1919 respectively.

21. The defendant has not paid to the Commissioner any portion of the amounts specified in the said last mentioned notices of assessment as payable by it.

The questions reserved for the consideration of the Full Court were as follows :—

(1) Is sec. 14 of the *War-time Profits Tax Assessment Act* 1917-1918 a valid exercise of the legislative power of the Parliament of the Commonwealth ?

(2) Is the plaintiff entitled in law upon the facts stated in this case to recover from the defendant the sums specified in the particulars endorsed on the writ or any of them or any and if so what part thereof ?

Each of the documents referred to in par. 20 of the case recited that Hipsley & Waddell Ltd. carried on a business to which the *War-time Profits Tax Assessment Act* 1917-1918 applied ; that that business was transferred to the defendant in June 1920, that war-time profits tax was subsequently assessed as being payable by Hipsley & Waddell Ltd. on the war-time profits of the business arising in the respective year, and that that company had failed to secure payment of that tax to the Commissioner. It then proceeded

to give notice to the defendant of the amount of the tax for the respective year and that the defendant was, under sec. 14 of the Act, liable to pay it.

E. M. Mitchell K.C. (with him *Alroy Cohen*), for the plaintiff. The case is within the plain meaning of sec. 14 (5) of the *War-time Profits Tax Assessment Act* 1917-1918, and there is no reason for restricting that meaning. Sec. 14 (2) gives to the Commissioner, in cases where there is a transfer of a business and where the transferee would be primarily liable, an option to assess the transferor in respect of the time prior to the transfer. Sec. 14 (5) provides that though the Commissioner has exercised that option the transferee is nevertheless liable to pay the tax.

Brissenden K.C. (with him *H. E. Manning*), for the defendant. The Commissioner cannot rely on sec. 14 (2), because he has never assessed the defendant in respect of the tax claimed. The " person for the time being owning " &c. in sec. 14 (2) means the person carrying on business at the time of the assessment (*Wankie Colliery Co.* v. *Commissioners of Inland Revenue* (1); *John Smith & Son* v. *Moore* (2)). The notices given on 22nd July 1925 were not assessments but notices of liability under sec. 14 (5). Sec. 14 (5) is limited to cases which come under sec. 14 (3). If it is not, it has no effect in this case, for it only operates if the payment of the tax has not been " secured " to the Commissioner, which cannot be done unless the Commissioner says in what way the tax is to be secured. Sec. 14 (5) is not intended to give to the Commissioner a cumulative right to recover the tax. Sec. 14 (5) deals with a different subject of taxation from that dealt with by the rest of the Act, and so sec. 55 of the Constitution is infringed. Sec. 14 (5) attempts to impose upon a person a tax in respect of a business in which he had no beneficial interest. (See *Osborne* v. *Commonwealth* (3); *Morgan* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (4).)

[KNOX C.J. referred to *Waterhouse* v. *Deputy Federal Commissioner of Land Tax (S.A.)* (5).

(1) (1922) 2 A.C. 51.
(2) (1921) 2 A.C. 13.
(3) (1911) 12 C.L.R. 321, at pp. 336, 356, 364, 372.
(4) (1912) 15 C.L.R. 661, at pp. 666, 667.
(5) (1914) 17 C.L.R. 665.

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

[RICH J. referred to *National Trustees, Executors and Agency Co. of Australasia* v. *Federal Commissioner of Taxation* (1).]

E. M. Mitchell K.C., in reply. The language of sec. 14 (5) is perfectly general and cannot be limited to sec. 14 (3). The business is the subject of taxation of the Act (*Wankie Colliery Co.* v. *Commissioners of Inland Revenue* (2)), and sec. 14 (5) deals with that subject of taxation (see *McKellar* v. *Federal Commissioner of Taxation* (3)) ; so that sec. 55 of the Constitution is not infringed.

Cur. adv. vult.

Oct. 11.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. In the month of June 1920 the business theretofore carried on by Hipsley & Waddell Ltd. (hereinafter referred to as the old company) was transferred to the defendant company as from 1st May 1920. In the years 1917, 1918 and 1919 the old company had made profits assessable to tax under the *War-time Profits Tax Assessment Act*, and in and after the month of February 1921 the plaintiff caused notices and amended notices of assessment in respect of such profits to be served on the old company. No portion of the tax so assessed has been paid nor has the payment thereof been secured. In July 1925 the plaintiff purporting to act under sec. 14 (5) of the Act gave notice to the defendant requiring payment of the several amounts of tax so assessed on the old company, and, payment having been refused, brought this action to recover such amounts together with further amounts alleged to be payable as additional tax by virtue of sec. 34 of the Act.

We propose to consider first the question whether the Commissioner is entitled to recover the three larger amounts claimed apart from the amounts claimed by way of additional tax. For the Commissioner it is said that in this case the business of the old company was transferred to the defendant after the commencement of the Act, that the several amounts now sued for represent war-time

(1) (1916) 22 C.L.R. 367, at p. 379. (2) (1922) 2 A.C., at p. 67.
(3) (1922) 30 C.L.R. 198.

profits tax assessed subsequently to the transfer as payable by the old company, and that payment of the tax to the Commissioner has not been secured by any person. Consequently, it is said, the defendant is, by sec. 14 (5) of the Act, made personally liable to pay these amounts. The facts alleged by the plaintiff are not disputed, but the defendant denies liability on two grounds, namely, (1) that sec. 14 (5) is invalid by reason of sec. 55 of the Constitution, and (2) that the old company was not liable to be assessed to war-time profits tax after the transfer of the business, and therefore the tax was not subsequently assessed—i.e., lawfully assessed—as payable by the old company. The first of these grounds is rested on the proposition that sec. 14 (5), if valid, deals with a subject of taxation other than war-time profits and is therefore within the prohibition imposed by sec. 55 of the Constitution. On this question we need say no more than that in our opinion it is disposed of by the recent decision of this Court in the *Federal Commissioner of Taxation* v. *Munro* (1). The argument in support of the second ground is founded on the proposition that when a business has been transferred the transferee and not the transferor is the person liable to be assessed to war-time profits tax in respect of profits made before the transfer. It cannot be denied that the House of Lords decided, under a provision of the Imperial Act expressed in words identical with those of sub-sec. 2 of sec. 14 of this Act, that when a business has been transferred the transferee is liable to be thereafter assessed to tax in respect of profits earned before the transfer (*Wankie Colliery Co.* v. *Commissioners of Inland Revenue* (2)). But in *Boase Spinning Co.* v. *Commissioners of Inland Revenue* (3), to which we have been referred by our brother *Rich*, the House of Lords decided that when there has been a change of ownership of the business the transferor is liable to be assessed, not only in respect of the broken period beginning at the end of the last accounting period before the change of ownership and ending on the date of such change, but also in respect of any previous accounting period the tax for which still remains unsatisfied. Applying this decision to the facts of the present case, it establishes

(1) *Ante*, 153.

(2) (1922) 2 A.C. 51.

(3) (1926) 135 L.T. 211.

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

Knox C.J. Gavan Duffy J.

the right of the Commissioner to assess the old company in respect of the profits made during the years covered by the assessments now under consideration, and it follows that the defendant is liable under sub-sec. 5 of sec. 14 to pay the amount of the tax so assessed as payable by the old company. The plaintiff is therefore entitled to recover the sums of £208 11s. 10d., £719 5s. and £807 15s. mentioned in the particulars.

We are, however, of opinion that the plaintiff is not entitled to recover the amounts claimed by way of additional tax. The liability imposed by sec. 14 (5) is limited to the tax assessed as payable by the former owner, and none of the amounts now under discussion was so assessed. The claim of the plaintiff in respect of these amounts is founded, not on any assessment, but on the provision of sec. 34 of the Act which imposes a liability to pay them by way of penalty for default in payment by due time of the tax assessed.

The questions should be answered as follows, namely:—(1) Yes. (2) The plaintiff is entitled to recover the sums of £208 11s. 10d., £719 5s., and £807 15s., but not the other sums claimed. Costs to be costs in the action.

ISAACS J. In my opinion both questions should be answered in the affirmative.

(1) The constitutional question is limited to the validity of sec. 14 as part of the Assessment Act 1917-1918. Necessarily the section must first be construed so far at least as is needful to answer the first question. In the first place, by its own express terms it is a purely *assessment* section. Its operation is confined to the "war-time profits tax" (sub-sec. 1). Sub-sec. 2 is equally limited to "the tax," which means the war-time profits tax. The tax, as has been definitely settled both in Australia (in *McKellar's Case* (1)) and in other cases in this Court, and in England under a similar statute (*Wankie Colliery Co.'s Case* (2)) is a tax which regards the business as bearing the charge, and so primarily the owner of the business for the time being is the person assessable. That is now a fixed legal doctrine.

(1) (1922) 30 C.L.R. 198. (2) (1922) 2 A.C. 51.

Sub-sec. 2 provides for three sets of circumstances :—(a) the owner for the time being of the business (owner including a person representing the owner) is normally the person to be assessed ; (b) where the business has ceased, so that normally no one could be assessed, then the last owner, or person acting as such, is assessable ; (c) where the business has changed hands, the Commissioner, if he thinks fit, may "take the accounting period as the period ending on the date on which the ownership has so changed and assess the tax on the person who owned or carried on the business or acted as agent for the person carrying on the business at that date." That is to say :—In the first case (a) the business may or may not have changed hands. In either case the assessable person is the owner, &c., at the date of assessment. That was necessary because at least two tax years had elapsed before the Assessment Act operated. In case (b) the necessity similarly arose. In case (c) a change of ownership might have taken place before, or it might have taken place after, the commencement of the Act. Both for revenue reasons and for reasons of justice between individuals, the Commissioner had a discretion given him in the words quoted. What is the full meaning of that discretionary power ? It is a trite principle of construction that every part of a section should be read before finally pronouncing on the meaning of any portion of it. Now, sub-sec. 5 is a very material part of sec. 14 in order to arrive at the true and full effect of sub-sec. 2. I cannot accept the suggestion for the defendant that it is limited in its relation to sub-sec. 3, and I need not say any more as to that. But it has a very close relation to sub-sec. 2. It deals with one of the alternatives included in sub-sec. 2, namely, the transfer of the business *after* the commencement of the Act. Now, in order to understand both these sub-sections, it is essential to observe that, if under the third branch of sub-sec. 2 the Commissioner elects to assess the former owner, he elects thereby to substitute him for the new owner, who apart from that election would be the person assessable. But that though at the time appearing to the Commissioner beneficial to the revenue or individually just or both, might prove after assessment to be extremely prejudicial to the Treasury. As to changes of ownership before the commencement of the Act, the Treasury has

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

Isaacs J.

to abide by the decision of the Commissioner. But in respect of transfers after the commencement of the Act, the new owner is warned that unless the tax assessed on the former owner is paid he, the new owner, is personally liable, as if no election had been made. In other words, the new owner *may* be relieved, but the Treasury *must not* lose. That leads me to a conclusion which harmonizes the section and gives to it a consistent, a just, and not an erratic operation. The election permitted to the Commissioner by the third branch of sub-sec. 2 is to make the responsibility of the new owner begin with his ownership, and to substitute for his assessability for the whole antecedent period the assessability of the former owner. There is, so to speak, a discretionary line of demarcation drawn by the election between the assessability of the former owner and that of the new owner. How that election may be made and evidenced is a matter for consideration under the second question. But assuming an effective election, it is nevertheless subject to sub-sec. 5. Sub-sec. 5 is not an independent provision. As such it would be unnecessary, because the new owner is himself primarily liable. But the sub-section assumes that somewhere in the Act, and presumably in the section, his primary and unconditional responsibility has ceased and the responsibility of the former owner has been substituted. Nowhere can the power to do this be found except in sub-sec. 2. The words " may subsequently be assessed " mean under sub-sec. 2, in the third case of that sub-section. But the conditional responsibility of the new owner would be singularly ineffective unless it extended to the whole period for which the former owner was assessable, and it would be both grotesque and, possibly, in the main, ineffective, unless the former owner were assessable for the whole period of his responsibility as that stood at the moment of transfer. In short, the Commissioner's election, if made, makes the former owner assessable for the whole back period, and the new owner conditionally free, but secondly assessable by way of security.

A question, however, has arisen whether the 10 per cent additional tax prescribed by sec. 34, where the tax is not paid within the proper period, is here payable by the defendant. If the reasoning on which my views are based is sound, the answer must be in the

affirmative. The new owner is normally primarily liable and he is permitted a secondary liability, but manifestly the Treasury is not to lose. He is expected by sub-sec. 5 to "secure the payment of the tax to the Commissioner," or take the possible consequences of a primary liability. There is no more injustice in making him pay the additional tax than in making him pay the original tax. As he is conditionally relieved, who is to see that the former owner pays punctually? Fairness to the revenue requires that it is his duty to do so, and, if the former owner fails to pay, it would be somewhat incongruous to look for the penalty to the former owner, assumedly unable to pay, and for the tax to the present owner, normally liable. The additional tax, though called a penalty, is not a penalty in the judicial sense of punishment; it is in reality additional taxation as a business compensation to the revenue for delay in payment, and is accessory to the principal sum due for tax. It must also be observed that the additional tax is never "assessed": it is a statutory consequence attaching to failure on the part of a person liable to pay the assessed tax. Sub-sec. 5 of sec. 14 *ex proprio vigore* declares the new owner "personally liable"—that is, he *remains* personally liable, notwithstanding any election to the contrary under sub-sec. 2—to pay whatever tax may be subsequently assessed against the former owner, if the new owner fails to *secure* the payment of that tax to the Commissioner. The new owner, therefore, is liable to pay, and ought either to pay immediately the former owner is notified of assessment, or to have taken care to secure due payment to the Commissioner, which it is his duty, or at least his interest, to provide for on a transfer. Unless he does one or the other, he fails in his statutory duty as from the moment of notification and is as justly bound to pay the additional tax as the original tax.

It is indispensable, however, to remember that sub-sec. 5 is a qualification of sub-sec. 2, because if it were, for instance, an entirely independent provision, so as to make B pay A's tax, simply because B had subsequently bought A's property, I should be greatly disposed to think that there was an entirely new tax, a poll tax. B's liability for profits, which arose from no property of his and were never received by him, and with which he had no connection,

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

Isaacs J.

and in respect of which by the hypothesis A was only personally liable, could hardly be called more than a poll tax or, at all events, a tax having for its true subject the failure of the real taxpayer to discharge his liability. If applied to ordinary income tax or to land tax, that is self-evident. But, construing it as I do, I can see no possible approach in this either to double subjects of taxation or to the "imposition" of taxation. My views on the latter point are sufficiently expressed in *Munro's Case* (1), where I have with some elaboration indicated those views and their agreement with the opinions of former members of this Court.

(2) The answer to the second question depends, first, on the operation of sec. 25 of the Act, and next, subject to that, on the construction of sec. 14 and the effect of the Commissioner's acts. Sec. 25 (1) says: "The production of any notice of assessment or of any document under the hand of the Commissioner, Assistant Commissioner or a Deputy Commissioner purporting to be a copy of a notice of assessment shall (*a*) be conclusive evidence of the due making of the assessment, and (*b*) be conclusive evidence that the amount and all the particulars of the assessment are correct; except in proceedings on appeal against the assessment, when it shall be prima facie evidence only."

If a statute makes certain evidence "conclusive," then in its presence a Court can pay regard to nothing else. The Act lays it down very clearly that assessments are to be disputed only in the way and within the time specified by the Act. If there were no power at all to assess the former owner, possibly—but still I say only possibly—a Court might disregard sec. 25. But here it is clear there was power, if a prescribed course were taken, to assess the former owner and to hold the present defendant liable under sub-sec. 5. The question is, therefore, whether the assessment was duly made, and, the production of the notice being conclusive, the question is in my opinion ended, for, although the point was not urged, I have no power to disregard the imperative direction of the Legislature to treat the evidence as conclusive, particularly in a matter of such high public policy. At the same time, as the question has been argued, it is certainly more satisfactory to state my opinion

(1) *Ante*, 153.

apart from that coercive provision, and as if there were a statutory appeal raising the objection. I am not even prepared to concede that, on an appeal under the statute, the notice of objection includes the point agitated at the trial. Again, I disregard that, and state my conclusions on the broad question of liability independently of the considerations mentioned.

The construction of sub-sec. 2 and sub-sec. 5 I have to a large extent already stated. What remains is to determine whether the Commissioner has made the election contemplated by the Act. An election may be made and evidenced by an act as well as by express words (see *Com. Dig.*, tit. "Election," C. 1; see also per *Blackburn* J. in *Ward* v. *Day* (1)). I do not read the latter part of sub-sec. 2 as requiring a complete set of assessments covering the whole of the antecedent period at peril of not validly covering any part of it. The antecedent period is, or might be, still divided into separate normal accounting periods of twelve months (sec. 7 (4)). The change of ownership may have taken place synchronously with the termination of an accounting period. It could hardly be said that in that case the latter part of sub-sec. 2 of sec. 14 had no operation. The Commissioner could still, in respect of all the prior accounting periods unassessed, "assess the tax on the person who owned . . . the business at that date," that is, the date on which the ownership changed. That is what the Commissioner has done in respect of the years sued for. His assessment of the former owner was an act of election to look to him, and not primarily to the new owner, in respect of the periods antecedent to the changes of ownership, leaving as against the new owner only the secondary liability to pay under sub-sec. 5. In face of these considerations and of sec. 25, I am quite unable to doubt that the second question should be answered in favour of the Commissioner.

I had written, as it stands, the above construction of sub-sec. 2 of sec. 14 before the case of *Boase Spinning Co. v. Commissioners of Inland Revenue* (2) was brought to my notice by the judgment of my brother *Rich*. I have since read that report and also the reports of the same case before the Court of Session (3)

(1) (1863) 4 B. & S. 337, at p. 356.
(2) (1926) 135 L.T. 211.
(3) (1925) Sc.L.T. 480.

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

Higgins J.

and the House of Lords (1). I may perhaps be permitted to express my satisfaction that all the judgments in that case confirm the conclusion I had independently arrived at as to the construction of the sub-section in question.

HIGGINS J. The only questions reserved for our consideration, in this action for war-time profits tax and additional tax, are (1) as to the validity of sec. 14 of the *War-time Profits Tax Assessment Act* 1917-1918; and (2) as to the right of the Commissioner to recover from the defendant company the sums specified in the particulars endorsed on the writ against the company.

I propose to deal with the second question first, on the assumption that sec. 14 is valid.

(I.) The business of Hipsley & Waddell Ltd. (the old company) was transferred to the defendant Hipsley's Ltd. (the new company) on 9th June 1920. Notices of assessment as for the tax for the years ending 30th June 1917, 30th June 1918, 30th June 1919, were given to the old company on 18th February 1921. These notices were given after the transfer of the business. The assessments must have been made not later than 18th February 1921, but the time of actual assessment is not stated apart from the dates of the notices.

There have been amendments of these assessments, and there have been objections served under the Act, and corrections made; but it is not necessary for us to consider these in detail. The writ issued against the new company on 17th December 1925 contains also a claim for additional tax of 10 per cent for delay in payment (under sec. 34); but the notices of assessment given to the defendant company on the 22nd July 1925, whether necessary or not, do not mention the additional tax.

Under sec. 30, the fact that an appeal is pending does not in the meantime interfere with or affect the assessment; and the tax may be levied and recovered on the assessment as if no appeal were pending. Under sec. 32 the tax becomes due and payable thirty days after the service of a notice of assessment.

Now, sec. 14 (2) enables the Commissioner to assess the tax on any

(1) (1926) Sc.L.T. 307.

person for the time being owning or carrying on the business or acting as agent for another person in carrying on the business, *or*, where a business has ceased, on the person who owned or carried on or acted as agent in carrying on the business immediately before it ceased, *and* where there has been a change of ownership of the business, the Commissioner, if he think fit, may take the accounting period as the period ending on the date on which the ownership has so changed and assess the tax on the person who owned or carried on the business or acted as agent for the person carrying on the business *at that date*.

Under sub-sec. 3 of the same sec. 14, the liquidator of a company being wound up has to give notice within fourteen days after the resolution or order to wind up, and has to set aside out of the assets such sum as the Commissioner thinks to be sufficient to provide for any such war-time profits tax as may become chargeable.

Sub-sec. 4 provides that when a business which is unable to pay its debenture-holders or creditors is carried on by a liquidator, &c., under the Court, no tax is to be levied or paid till provision has been made for payment of the debenture-holders or creditors. Sub-sec. 5 seems to be designed to put pressure on any transferee of the business to see that provision is made for payment of the tax primarily payable by the former owner. If he do not see to this, he may, just as a purchaser of real estate may be liable for unpaid rates payable by his vendor, be himself liable to the tax. The exact words are: "(5) In any case in which a business is transferred to another person after the commencement of this Act" (22nd September 1917), "the person to whom the business is transferred shall be personally liable to pay any war-time profits tax which may *subsequently* be assessed as payable by the former owner if he fails to secure the payment of that tax to the Commissioner."

It is under this sub-sec. 5 that the Commissioner sues the new company; and the question is, does the action lie? The business was transferred after the commencement of the Act; the assessment was made *subsequently* to the transfer, as payable by the old company; and there was a failure to secure the payment of the tax to the Commissioner. It does not matter, for the purpose of the question,

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

Higgins J.

whether the words "if he fails to secure the payment" refer to the failure of the old company or to failure of the new company; for there has been no securing of the payment by anyone. The sub-section clearly implies that the old company may be assessed *subsequently* to the transfer—as was done in this case. Why should not effect be given to this sub-section? It confers a substantive power on the Commissioner. It cannot be regarded as a mere qualification of sub-sec. 3, as Dr. *Brissenden* suggests.

The difficulty arises from the decision of the House of Lords in the *Wankie Co.'s Case* (1). Sub-secs. 2 and 3 of sec. 14 are copied from the British *Finance Act* 1915 [No. 2], sec. 45; and, under the British Act, it was held, by three Law Lords against two, that the words "for the time being" in that part of the Act which corresponds with our sub-sec. 2 of sec. 14, refers to the time of assessment. The British Commissioners of Inland Revenue, therefore, have to assess the person carrying on the business at the time of the assessment. In the case before us, the assessment was made on the old company, not on the new company which actually carried on the business at the time of the assessment. We are always prepared to accept the interpretation of a section as found by the House of Lords, if our section is the same; but it is not. In the British Act there is no provision such as that contained in sub-sec. 5. The question is not what does sub-sec. 2 mean, if isolated, but what the whole of our sec. 14 means, taken with the rest of the Act. It is all a matter of interpretation. It is said that the draughtsman assumed, and wrongly, that the words "for the time being" in sub-sec. 2 referred to the time in which the profits were made—that he who takes the profits is to pay the tax thereon. But what the draughtsman has assumed, the Legislature has assumed; and what the Legislature has assumed is what the Legislature means; and what the Legislature means is the law that binds us.

The provisions of our sec. 14 are obviously designed to make the path of the Commissioner easy, even though it make the position of the public difficult. There is not any express provision that the old company shall indemnify the new company when the old company has taken the relevant profits and the new company is called upon

(1) (1922) 2 A.C. 51.

to pay the tax on those profits. Lord *Dunedin*, in his dissenting judgment in the House of Lords, pointed out this anomaly arising from the interpretation put by the majority of the Law Lords in the *Wankie Co.'s Case* (1); and the anomaly arises also under our sec. 14. Sub-secs. 2 and 3 are copied from the British Act of 1915; sub-sec. 4 is copied from sec. 56 of the British *Finance Act* of 1916; but for sub-sec. 5 there is no precedent in the British Acts. We do not, therefore, refuse to follow the decision of the House of Lords when we say that our Australian Act is different from the British Act, vitally different as to the very matter which the House of Lords decided.

It has been suggested, indeed, that the operation of sub-sec. 5 was meant by Parliament to be limited to the case described in the third limb of sub-sec. 2, where, on a change of ownership, the Commissioner has exercised his option to take the accounting period as the period ending on the date of the change. No such limitation is expressed in sub-sec. 5; the words are "*In any case*"; there is no reference to the exercise of the Commissioner's option. Nor is sub-sec. 5 applicable to *all* changes of ownership, as is sub-sec. 2, but only to *transfers*—obviously, transfers *inter partes* by agreement with the former owner. I say obviously, for in a transfer *inter partes*, made "after the commencement of this Act," the transferee is in a position to safeguard himself from liability by making a stipulation for payment of the tax for the time previous by the transferor; whereas in a transfer by operation of law he is not. Sub-sec. 5 is as clearly a substantive enactment, as independent of sub-sec. 2, as are the intervening sub-secs. 3 and 4.

Having once found the *Wankie Co.'s Case* (1) is not an authority as to the meaning of sec. 14, it is our duty to give effect to sec. 14 according to its natural meaning. Even if there were another possible meaning that could be given to sub-sec. 5, such as would bring our section more into harmony with the British legislation, it is not our duty to strain the construction of our own Act for such a purpose. Our duty is surely—if we are not bound by the British decision—to give our own section its natural construction, such a construction as we would give it if there were no British Act and no British decision on the British Act.

(1) (1922) 2 A.C. 51.

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

Higgins J.

In my opinion, if the Act is valid, the Commissioner is entitled to recover from the defendant the tax as finally assessed—at all events, the main tax apart from the 10 per cent penal additions due to the delay (sec. 34). Sec. 14 (5) makes the transferee of the business personally liable to pay any war-time profits tax which may, after the transfer, be assessed as payable by the former owner; but it does not expressly make the transferee liable to pay the penalty which the former owner was primarily liable to pay. This is a taxing Act; and liability to pay under it cannot be found except by express words or by necessary (as distinguished from conjectural) implication. As I have already said, these penalties are not even included in the notices of assessment given to the new company on 22nd July 1925.

(II.) It is contended, however, by the defendant company that sec. 14 is invalid as offending against the provisions of sec. 55 of the Constitution, the second clause. The words of this clause are: "Laws imposing taxation, except laws imposing duties of customs or of excise, shall deal with one subject of taxation only; but laws imposing duties of customs shall deal with duties of customs only, and laws imposing duties of excise shall deal with duties of excise only."

There is no express provision in the Constitution as to the consequences of disobeying this clause. But, whatever the consequences may be, there is not, in my opinion, any disobedience; for the law imposing the taxation deals with one subject of taxation only. It is argued that the tax on the transferee of the business is a different tax from the tax on the owner of the business before the transfer; but the *subject* of taxation remains the same throughout —war-time profits. The *objects* of the tax—the persons taxed—may be changed without offending against sec. 55 of the Constitution. This distinction between *subjects* and *objects* is well recognized under wills and deeds (cf. *Jarman on Wills*, 5th ed., pp. 327, 342—Uncertainty as to *subjects* of gift v. uncertainty as to *objects*).

This Assessment Act (No. 33 of 1917) is, indeed, to be treated as incorporated with the Act passed on the same date (22nd September 1917), which expressly imposes the tax (*War-time Profits Tax Act*, No. 34 of 1917). But the Act No. 34 of 1917 does not define the

persons on whom the tax is to fall; that definition is supplied by this Assessment Act, No. 33 of 1917; and if we must treat the two Acts as if they were one law imposing the tax, the law deals with only one *subject* of taxation. The compound law does not *deal with* more than one subject of taxation. I adhere to what I said on this subject in *Osborne's Case* (1), especially as I find that the same view is supported by the late Chief Justice *Griffith*.

In my opinion, the argument that sec. 14 is invalid fails; and the answer to the first question asked should be Yes; and the answer to the second question Yes—as to the sums of £208 11s. 10d., £719 5s., £807 15s.

RICH J. The objection which lies at the threshold of this case, and which should be dealt with before the second ground of defence, raises the question of the validity of sec. 14 (5) of the *War-time Profits Tax Assessment Act* 1917. It was contended that the sub-section is invalid as offending against the provisions of sec. 55 of the Constitution because it is said to deal with two subjects of taxation. This question has recently been discussed in *Federal Commissioner of Taxation* v. *Munro* (2), and I adhere to what was decided in that case.

The sub-section being, in my opinion, valid, the second ground falls to be considered, whether after the transfer of the business, which took effect as from 1st May 1920, the old company was liable to be assessed for profits made before the transfer. In my opinion the tax was validly assessed. I base my opinion on that part of sec. 14, sub-sec. 2, which provides for a change of ownership—"where there has been a change of ownership of the business, the Commissioner may, if he thinks fit, take the accounting period as the period ending on the date on which the ownership has so changed and assess the tax on the person who owned or carried on the business or acted as agent for the person carrying on the business at that date"; and on sub-sec. 5, which is not contained in the Imperial Act—"In any case in which a business is transferred to another person after the commencement of this Act, the person to whom the business is transferred shall be personally liable to pay

(1) (1911) 12 C.L.R., at pp. 372-373. (2) *Ante*, 153.

H. C. OF A. 1926.

FEDERAL COMMISSIONER OF TAXATION v. HIPSLEYS LTD.

Rich J.

any war-time profits tax which may subsequently be assessed as payable by the former owner if he fails to secure the payment of that tax to the Commissioner." Under the limb of sub-sec. 2 already stated the Commissioner was, in my opinion, entitled to take any period or periods prior to the change of ownership in respect of which assessment was still pending and to assess the old company to the tax in respect of the years 1916-1917, 1917-1918, 1918-1919. In a recent case in the House of Lords, which came to my hands after the argument in this case, the question whether the powers of the British Commissioners of Inland Revenue were limited to a single period was discussed. In dealing with this contention, after pointing out that in argument stress was laid upon the word " period " being in the singular, the duty in the charging sec. 38 (1) (of the Imperial Act) being laid on the profits in any accounting period, Lord *Dunedin* said :—" I think the simple answer to this is that while the end of a period may be fixed by the Commissioners as at the date when the ownership changed, there is nothing to prevent them taking the beginning of the period as the point from which the tax still remains unsatisfied. The business, as the present Lord Chancellor, Lord *Cave*, observed in *John Smith & Son* v. *Moore* (1), is a continuous business though the ownership has changed. But further, it seems to me that the point is really settled by the opinions delivered in *Wankie's Case* (2). Certainly the opposite view, starting from *Wankie's Case*, would be very anomalous. It has to be admitted that the broken period under the option could be charged against the old company, yet the period which preceded it would be charged on the new company—a curious inversion of affairs. Lord *Buckmaster*, speaking of this final provision of sec. 2, says : ' Where the business has changed, the accounting period may be taken up to the moment when the change took place, and, once more, if the person for the time being were the then owner, there was no need for further words ; but again, the statute declares that in that event the duty can be assessed on the person then owning the trade.' And further on he says : ' The fact that the clause places in the hands of the Commissioners a discretion as to

(1) (1921) 125 L.T. 481 ; (1921) 2 A.C. 13.

(2) (1922) 127 L.T. 181 ; (1922) 2 A.C. 51.

the person they may select for payment does not appear to me to have great weight.' In the same case I was in the minority, but speaking on what the majority judgment amounted to I said: 'Upon the opposite contention . . . clause 3 admittedly gives the Commissioners a right to impose the tax on A or B as they think fit, a very peculiar position' " (*Boase Spinning Co.* v. *Commissioners of Inland Revenue* (1)). Then sub-sec. 5 of the Commonwealth Act, to which I have referred, assumes the liability of both transferor and transferee and, in the circumstances of that sub-section, makes the transferee liable to pay the tax. For these reasons I answer the first question in the affirmative.

The second question should also be answered in the same way. Sec. 34 of the *War-time Profits Tax Assessment Act* 1917 merely provides for a statutory increase in the case where the tax is not paid by any "taxpayer" under the circumstances stated in the section.

Questions answered:—(1) *Yes.* (2) *The plaintiff is entitled to recover the sums of* £208 11*s.* 10*d.*; £719 5*s.*; £807 15*s.*

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

Solicitors for the defendant, *Norton, Smith & Co.*

B. L.

(1) (1926) 135 L.T., at pp. 214, 215.