H. C. OF A. 1929. LANGMAN v. HANDOVER. Starke J.

does not conflict with the principle stated in *Hanson* v. *Keating* (1) and *Lodge* v. *National Union Investment Co.* (2), whatever may be said as to the jurisdiction of the Supreme Court in its equitable jurisdiction, in view of the decision in *David Jones Ltd.* v. *Leventhal* (3).

Consequently, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *W. P. Kelly*, Wellington, by *Maurice J. McGrath.*

Solicitors for the respondent, *McManamey & Jelf*, Dubbo, by *McLachlan, Westgarth & Co.*

J. B.

(1) (1844) 4 Ha. 1; 67 E.R. 537. (2) (1907) 1 Ch. 300.
(3) (1927) 40 C.L.R. 357.

[HIGH COURT OF AUSTRALIA.]

THOMSON . . . . . APPELLANT;

AND

DEPUTY FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1929. PERTH, *Sept.* 5, 6. Knox C.J., Gavan Duffy, Rich and Dixon JJ.

Income Tax (Cth.)—Assessment—Gain in the nature of income or of capital—Grazing lease—Sale of timber thereon—Income Tax Assessment Act 1922-1927 (*No.* 37 *of* 1922—*No.* 32 *of* 1927), *secs.* 16 (*d*),* 23 (1B)—*Land Act* 1898 (*W.A.*) (62 *Vict. No.* 37), *sec.* 68.

The proceeds of the sale of timber to be removed from land held by the appellant from the Crown under a conditional purchase grazing lease were assessed by the Federal Commissioner of Taxation as income.

* The *Income Tax Assessment Act* 1922-1927 provides by sec. 16 that the assessable income of any person shall include "(*d*) 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."

Held, that the money received by the appellant on such sale was the proceeds of the realization of part of her capital, and not income assessable under the *Income Tax Assessment Act* 1922-1927.

APPEAL from the Supreme Court of Western Australia.

The appellant, Elizabeth Viola Thomson, was the lessee of a grazing lease of 1,000 acres of land selected from the Crown under ordinary grazing conditions and included in the farm of her husband. It had been acquired in 1903, and had been used for agistment purposes. In 1925 the appellant and her husband entered into an agreement with a timber company to sell to the company the growing timber not less than 4 feet 6 inches round the butt at a height of 3 feet from the ground, on her property and part of the property of her husband. The company was to cut and take away the timber for five years, for which the company paid £1,800, and of this sum the Commissioner of Taxation allocated £1,400 to the appellant and assessed her for income tax on that amount as income from property for the financial year 1926-1927. An appeal by the appellant to the Supreme Court of Western Australia against this assessment was heard by *Draper* J., who dismissed it on the ground that the proceeds of the sale of the timber after severance were assessable as income in the same way as the proceeds of crops grown and sold from cultivated lands or grass consumed by sheep on agistment.

From this decision the appellant now appealed to the High Court.

J. P. Dwyer and *M. Crawcour*, for the appellant. The proceeds of the sale of the timber were not income at all: the sale of the timber was the sale of an asset. There was no trade nor was there a sale of an annual crop; therefore the distinction between capital and income is obvious. The value of the property was reduced by the severance of the timber from the land; and there is no question as to income arising from personal exertion: therefore the sale amounted to the realization of a portion of the appellant's capital.

J. L. Walker, for the respondent. The transaction the subject of the agreement for the sale of growing timber was either a sale of a leasehold interest in the land or the sale of a chattel—that is to say,

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the sale of timber severed from the land. If it were a sale of a leasehold interest in the land, then the consideration which passed from the purchaser to the taxpayer was taxable income under the provisions of sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1927. If, on the other hand, it was merely a sale of a chattel, then the proceeds of the sale were income from property, because the taxpayer acquired the land for the purpose of deriving income from the use or the ownership thereof, and the sale of natural products was just as much a use of the land as the sale of crops grown thereon. The fact that the taxpayer acquired the land originally for grazing purposes was not material, because the evidence established that the land ceased to be useful for that purpose ten years previously, and it was open to the taxpayer to derive income from the ownership by another use of the land, and the sale of the timber was such another use. (See *Marshall* v. *Green* (1); *Smith* v. *Surman* (2); *Adams* v. *Commissioners of Taxation* (3).)

Counsel for the appellant were not called upon in reply.

Cur. adv. vult.

Sept. 6.

THE COURT delivered the following written judgment:—

This is an appeal from a judgment of *Draper* J. by which he dismissed an appeal to him of the appellant from an assessment by the Deputy Federal Commissioner of Taxation for income tax for the financial year 1926-1927 based upon income derived during the year ending 30th June 1926. By this assessment the appellant's income from property was assessed at £1,440. According to the assessment she had no income from personal exertion. The sum of £1,440 was part of an amount of £1,800 paid to the appellant and her husband during the year ending 30th June 1926 under an agreement made on 25th July 1925 between them and R. C. Connell Ltd. By this agreement the appellant and her husband agreed to sell, and the company agreed to buy, all timber not less than 4 feet 6 inches round the butt at a height of 3 feet from the ground growing upon two adjoining parcels of land, and they granted to the company

(1) (1875) 1 C.P.D. 35.
(2) (1829) 33 R.R. 259; 9 B. & C. 561; 4 Man. & R. 455; 7 L.J. K.B. 296; 109 E.R. 209.
(3) (1910) 10 C.L.R. 180.

liberty to enter with servants and workmen for the purpose of cutting and removing the timber so sold. The company agreed to pay as purchase-money for the "said timber and rights" the sum of £1,800. The parcels of land were Crown leases which had been taken up one by the appellant and one by her husband. The Commissioner attributed £1,440 of the £1,800 to the land of which she was lessee. She had taken up this land as far back as 1903. Neither she nor her husband took up the land with a view to growing or selling timber, and at first they had used it for grazing. It had, however, been eaten out by overstocking. There is therefore no question in this case of a business, trade, pursuit or avocation; and this the Commissioner in effect admits by treating the sum in question as income from property. Upon these facts we see no reason why the proceeds of the sale of the timber should be considered as income. The timber formed part of the asset which the appellant acquired when she took up the land. It is true that timber increases by growth, but that growth is not an increase in the value of the asset which may be detached and yet again recur annually or periodically. It would be contrary to facts to regard the land as a capital asset by which timber was produced with regularity as something in the nature of a recurring profit from the land.

We think the transaction by reason of which the sum of £1,440 was received by the appellant was neither more nor less than the conversion into money of part of her capital, and therefore was not income.

Appeal allowed. Order of Draper J. discharged. Assessment varied by striking out the sum of £1,440. *Respondent to pay the costs of the appeal to the Supreme Court and of this appeal.*

Solicitors for the appellant, *M. Crawcour.*

Solicitor for the respondent, *J. L. Walker,* Crown Solicitor for Western Australia.