Disc
Stephen v
Federal
Commissioner
of Land Tax
(1930) 45
CLR 122

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1929-1930.

[HIGH COURT OF AUSTRALIA.]

CLARK TAIT AND COMPANY AND ANOTHER . . . . . } APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

Land Tax (Cth.)—Assessment—Crown lease created before commencement of Act—Taxable interest of lessee—Unimproved value of leasehold estate—"Annual rent"—"Unexpired period of the lease"—Uncertainty—Land Tax Assessment Act 1910-1927 (*No.* 22 *of* 1910—*No.* 30 *of* 1927), *secs.* 27, 28, 29—*Land Acts* 1910-1924 (*Q.*) (1 *Geo. V. No.* 15—15 *Geo. V. No.* 33), *secs.* 42, 43, 146.

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SYDNEY, *Aug.* 12, 13.

MELBOURNE, *Oct.* 15.

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

The owner of a leasehold estate in Crown lands in Queensland under a lease made or agreed to be made before the commencement of the *Land Tax Assessment Act* 1910-1927 is not liable to pay land tax on the unimproved value of such land if, at the date of the material valuation on which assessment to tax was made, the annual rent reserved by the lease cannot be accurately ascertained and the unexpired period of the lease is of uncertain duration.

The appellants held five areas of land in Queensland under leases granted by the Crown under the *Land Acts* of that State. One of the said leases (which was typical of all) provided that the lessees should hold the land the subject matter thereof, for pastoral purposes only, for the term of 29½ years from 1st July 1904 at the rent therein provided until the Land Court constituted by the said *Land Acts* should otherwise determine and thereafter at such yearly rent as the said Land Court should from time to time determine. During the currency of the lease the rent was altered by the

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Land Court on several occasions. It was further provided by the terms of such lease that the lessees should hold the land leased subject to the rights, powers, privileges, terms, conditions, exceptions, restrictions, reservations and provisoes contained in the said *Land Acts* and the Regulations thereunder. The *Land Acts* of Queensland contained provisions for the resumption by the Crown of parts of the land the subject of a Crown lease during the currency of such lease.

Held, by *Knox* C.J., *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that as the rent reserved by the lease and the duration of the term of such lease were uncertain the only method provided by the *Land Tax Assessment Act* 1910-1927 of assessing the unimproved value of the leasehold estate of the appellants in the said lease could not be applied, and consequently the provisions of secs. 27, 28 and 29 of the said Act were not applicable to such a lease; and

By *Starke* J., that the provisions of the *Land Tax Assessment Act* 1910-1927 were not applicable, on the ground that the rent reserved was not certain during the unexpired period of the lease.

CASE STATED.

On the hearing of appeals to the High Court by Clark Tait & Co. and Northampton Pastoral Co. Ltd. from assessments of them by the Federal Commissioner of Land Tax for land tax for the years 1914-1915, 1917-1918, 1919-1920, 1920-1921, 1921-1922 and 1922-1923, *Rich* J. stated a case, which was substantially as follows, for the opinion of the Full Court:—

1. The appellants are lessees of Crown lands in the State of Queensland.

2. The leases in question in the said appeals under which the appellants hold are five in number and commence as from various dates, but are all in substantially the same form.

3. The document annexed hereto and marked "A" and forming part of this case is one of such leases.

4. For the purposes of this case stated it is sufficient to state the facts relating to this lease, and to confine the questions to this lease, inasmuch as the answers thereto will enable me to decide the appeals in relation to all the said leases.

5. The said lease is expressed to be for a term of 29½ years from 1st July 1904 and was granted as under the *Land Act* 1902 of the State of Queensland (sec. 8).

6. The provisions of sec. 10 (1) of the said Act (now contained in sec. 42 of the *Land Acts* 1910-1924) apply to the said lease and result in the term of 29½ years, being divided into three periods, the first of which would expire on 30th June 1914, the second of which would expire on 30th June 1924 and the third on 31st December 1933.

7. The Land Court on 11th September 1917 determined the rent at 63s. 9d. per square mile as from 1st July 1914. The rent mentioned in the said lease of £447 16s. 11d. equals 27s. 8d. per square mile (see sec. 43 (ii.) of the said Act).

8. The Land Court on 4th March 1921 determined the rent for the second period as from 1st July 1914 to be 95s. per square mile.

9. The area of the land contained in the parcels to the lease was 323 square miles at the date of the said lease.

10. Pursuant to the provisions contained in sec. 146 of the said *Land Acts* and the corresponding previous enactments, resumptions of land comprised in the said lease were made as follows: on 1st July 1907, 41½ square miles, reducing the area to 281½ square miles, and on 1st March 1915, 53½ square miles, further reducing the area to 228 square miles.

11. The land the subject of the said lease was mentioned in the Second Schedule to the said *Land Acts*, and it was provided in the said Schedule that one-fourth of such land was liable to be resumed at any time subsequent to 31st December 1913.

12-19. The Commissioner assessed the appellants for land tax for the financial year 1914-1915 and for the succeeding financial years up to and including 1921-1922 on land held by them on 30th June of the respective financial years.

20. In each of the assessments the Commissioner included the said lease marked "A" together with the other leases mentioned in par. 2 hereof as liable to assessment by reason of secs. 27 (3), 28 and 29 of the *Land Tax Assessment Act* 1910-1914 and 1910-1916.

21. For the purpose of arriving at the said assessments the unimproved value of the land included in the said lease was estimated by the Commissioner at a sum 4½ per cent of which exceeds a rent of 95s. per square mile, whether calculated on the original area or on the areas reduced by resumption.

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22. The above-mentioned appeals heard by me are from these assessments.

23. The appellants contend (1) that the said lease does not fall within the combined operation of secs. 27 (3), 28 and 29 and should not have been included in their assessment; (2) that in the case of each and every of the said assessments there was no "annual rent reserved by the lease" within the meaning of sec. 28 (3) (*a*) of the *Land Tax Assessment Act*; (3) that there was no unexpired period of the said lease within the meaning of the said sec. 28 (3) (*a*); (4) that there are no means provided by the said *Land Tax Assessment Act* for calculating the amount if any by which 4½ per cent of the unimproved value of the land included in the said lease exceeded the annual rent reserved by the lease for the unexpired period of the lease at 4½ per cent according to the calculations based on the prescribed tables; (5) that there are no means provided by the said *Land Tax Assessment Act* by which the unimproved value (if any) of the lessee's estate in the land the subject of the said lease can be ascertained.

The questions for the Court are as follows:—

(1) Does the said lease come within the combined operation of secs. 27 (3), 28 and 29 of the *Land Tax Assessment Act*?

(2) If so, what is the annual rent reserved by the lease for the purpose of each such assessment within the meaning of sec. 28 (3) (*a*) of the *Land Tax Assessment Act*?

(3) In the case of each such assessment, is there an unexpired period of the lease within the meaning of sec. 28 (3) (*a*) of the *Land Tax Assessment Act*?

(4) If so, what was the unexpired period of the said lease on 30th June in each of the years 1914 to 1921, inclusive?

(5) How, if at all, are the prescribed tables referred to in the said sec. 28 (3) (*a*) to be applied in respect of the said lease in each of the said assessments?

The lease marked "A" referred to in the case stated was between one Alexander Dyce Murphy (the predecessor in title of the appellant Clark Tait & Co.) of the one part and the Crown of the other part, the material portions being as follows:—"We do hereby for Us, Our Heirs and Successors, demise and lease unto the said Alexander

Dyce Murphy, his executors, administrators and assigns . . . all that piece or parcel of land situate in the District of Mitchell known as Northampton Downs . . . to hold the same unto the said lessee, for pastoral purposes only, for and during the term of twenty-nine and one-half years, to be computed from the first day of July 1904, subject to the said rights, powers, privileges, terms, conditions, provisions, exceptions, restrictions, reservations and provisoes in the said Act and the regulations thereunder now or hereafter to be made and in these presents respectively contained: yielding and paying unto Us . . . the said sum of four hundred and forty-seven pounds sixteen shillings and eleven pence until the first day of January, or the first day of July nearest to the date of the determination of the rent of the said holding by the Land Court and thereafter such yearly rent or sum as the Land Court shall from time to time determine for the various periods into which the said term is divided in accordance with the said Act, such rent to be paid on or before the thirtieth day of September in each and every year during the currency of this lease; . . . the first future payment to be made on the thirtieth day of September now next ensuing: Provided always that until the rents for the various periods, if any, subsequent to the first, shall have been assessed and determined by the said Land Court, the said lessee shall continue to pay at the time . . . hereinbefore prescribed the same amount of rent as theretofore paid by the said lessee or his predecessor in title, or shall pay the minimum rent prescribed by the 64th section of the *Land Act* 1897, whichever shall be the greater amount."

Other material facts are stated in the judgments hereunder.

Ham K.C. (with him *Russell Martin*), for the appellants. Leases of the nature under consideration do not come within the provisions of the *Land Tax Assessment Act* by reason of the contentions set out in the case stated. On a proper interpretation of secs. 42 and 43 of the *Land Acts* 1910-1924 (Q.) the Land Court can make a retrospective assessment for rent for a period other than that during which the Court is sitting.

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[STARKE J. referred to *South Australian Land Mortgage and Agency Co.* v. *The King* (1).]

It cannot be said in respect of any lease, a term of which is that it is to be of such a rent as may be afterwards determined, that the unimproved value can be calculated in accordance with the provisions of the *Land Tax Assessment Act*, sec. 28 (3). Reading the *Land Tax Assessment Act* and the Regulations thereunder as a whole, it is sufficiently clear that the Legislature did not intend to tax Crown leases other than those which had a fixed rent or which reserved a rent ascertainable with certainty for an ascertainable unexpired term. The subject leases do not come within the words of the Act. The Act was aimed at freehold tenure, not leasehold tenure. Special provision was made to prevent evasion by the taking up of long leases after a certain date by sec. 27. The owners of freehold who had granted long leases at low rentals prior to that date were protected by sec. 28 of the Act. The Legislature has not provided machinery by which the tax on these Crown leases can be assessed. Rent and duration are an uncertain quantity and, in such a position, the quantum of tax cannot be ascertained. The tables in the Schedule are inapplicable; and no tables could be prescribed under sec. 28 (3) to capitalize the uncertain.

Jordan K.C. (with him *Pitt*), for the respondent. The fact that the area of the land referred to in a lease is liable to reduction is immaterial for the purposes of sec. 28 of the *Land Tax Assessment Act* because, even though part or parts of such land are liable to resumption under sec. 146 of the *Land Acts*, such a resumption cannot be effected before a certain date, so that until that certain date there is an assured tenure of the land.

[KNOX C.J. But the Land Court by sub-sec. 3 may increase or decrease the area at will.]

The position, so far as sec. 29 of the *Land Tax Assessment Act*, as amended by the Amendment Act of 1914, is concerned, is that all leases are subject to taxation with or without revaluation. By virtue of sec. 27 (3) a Crown lease, where it is taxable at all, is taxable as though it were a private lease before the Act. Sec. 28 (3) (*a*)

(1) (1922) 30 C.L.R. 523.

really serves to solve this aspect of the problem. The method prescribed by the Act itself, although it may not be ideal or true, must be followed in order to ascertain the taxable interests. The " annual rent reserved by the lease " means the annual rent reserved by the lease at the relevant 30th June. This view was tacitly adopted in *Black* v. *Federal Commissioner of Land Tax* (1).

[KNOX C.J. The point was not discussed, nor was it necessary for the decision in the case. His Honor referred to *Heydon* v. *Deputy Federal Commissioner of Land Tax* (2).]

In that case *Griffith* C.J. said (3) :—" Sec. 28 lays down rules for the assessment of land tax upon leaseholds. The rules are arbitrary . . . but all we have to do is to see what they mean and to follow them." The case was a decision on the Act in its original form, and the methods followed in that case are not the methods now prescribed. Reg. 47 was in force at the relevant times, but it became obsolete in 1912, and therefore is now of no assistance.

[ISAACS J. referred to sec. 12.]

One-fourth of the land in question was liable to resumption without compensation, and such land must be taken at a given time. It is immaterial that on a construction of the section the whole of the land could be resumed with compensation. One method of applying sec. 28 to a case of this sort is in effect to treat the position as if there were two leases of the land. The possibility of the resumption of any part of the area could be disregarded. As to the term, it is to be assumed that it will not be disturbed. As to whether a lessee has a taxable interest in the land, see *Coal Cliff Collieries Ltd.* v. *Federal Commissioner of Land Tax* (4).

Ham K.C., in reply. Crown leases which are taxable are brought within the Act by sec. 27 (3), as amended by the Act of 1914, which has the effect of bringing them within sec. 28. Sec. 29 of the Act was dealt with in *Attorney-General for Queensland* v. *Attorney-General for the Commonwealth* (5). The Legislature intended to tax a lessee where he had an estate which was a diminution of the estate of

(1) (1920) 27 C.L.R. 483.
(2) (1914) 17 C.L.R. 727.
(3) (1914) 17 C.L.R., at p. 729.
(4) (1917) 24 C.L.R. 197.
(5) (1915) 20 C.L.R. 148.

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the freeholder. A taxing Act must be in clear and unambiguous terms (*Greenwood* v. *F. L. Smidth & Co.* (1)).

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND RICH JJ. The general policy of the *Land Tax Assessment Act* 1910-1916 is to tax the unimproved value of estates of freehold ; but, consistently with this policy, it was thought desirable to tax the estate or interest, upon an unimproved basis, of leaseholders when the rent reserved was so far below what is commonly called an " economic rent," namely, a rack rent, as to leave the leaseholder with a valuable interest in land. Sec. 27 is directed to ascertaining the quantum of the value, upon an unimproved basis, of leaseholders whose terms were granted after the commencement of the Act. Such leases would be granted with the full knowledge of the mode in which the Act operated, and therefore required a treatment somewhat different from that which should be given to leases made before the Act was passed. Sec. 28 accordingly provides particularly for leases granted before the commencement of the Act. It performed the double function of enabling the owner of an estate of freehold who has granted such a lease to diminish the value at which his reversion is included in his assessment by deducting the value of the lessee's interest—or what the statute calls the lessee's estate—and of bringing it into the lessee's assessment for the purpose of tax. Sub-sec. 3 (*a*) provides what shall be the unimproved value of the lease or leasehold estate upon which the tax is to be levied. It arbitrarily fixes $4\frac{1}{2}$ per cent of the unimproved value of the land as " the economic " or rack rent of the land, and then determines the unimproved value of the estate by capitalizing the excess of that arbitrary rack rent over so much of the actual rent reserved as is considered attributable to the unimproved value of the land. Par. (*b*) of sub-sec. 3 of sec. 28 prescribes a method for computing the amount of the actual rent which is attributable to the unimproved value of the land. Par. (*a*) prescribes the method of determining the unimproved value of

(1) (1922) 1 A.C. 417, at p. 423.

the lessee's interest by capitalizing the excess over the rack rent. The material part is as follows: "For the purposes of this section— (*a*) the unimproved value of a lease or leasehold estate in land means the value of the amount (if any) by which four and a half per centum of the unimproved value of land exceeds the annual rent reserved by the lease, calculated for the unexpired period of the lease at four and a half per centum, according to the calculations based on the prescribed tables for the calculation of values." It is manifest from the mere reading of this provision that the intention was to tax the capital value of the interest which the lessee possessed by reason of the fact that he was entitled in possession to an estate of definite duration for which he was periodically required to pay a sum certain so that on any given 30th June the future duration of his estate was ascertainable and the future payments of rent were known. The present value of the estate on any 30th June consisted in the advantage which such a definite tenure and definite rent gave him in comparison with the rack rent, real or fixed artificially. It was upon this advantage ascertained by comparison with the arbitrary rack rent of $4\frac{1}{2}$ per cent on the unimproved value of the land that the tax was to be levied.

This intention seems to us to be well expressed by the language used. What is to be capitalized is the amount by which $4\frac{1}{2}$ per cent exceeds the annual rent reserved by the lease and the amount is to be calculated for the unexpired period of the lease. Further, it is to be calculated at $4\frac{1}{2}$ per cent according to calculations based on tables for the calculation of values. The expression "rent reserved by the lease" is apt to describe a sum certain issuing out of the land and payable year by year. It is, of course, not necessary that the sum each year shall be the same, but it is necessary that it shall be certain for each year and payable yearly or by reference to a year or parts of a year. It is nothing to the point that the rent is certain for a given year unless it is certain for every future year of the term and antecedently certain. The "unexpired period of the lease" refers to a duration of time with a certain end. The Act itself provides for a certain beginning, namely, 30th June of the given year. A calculation at $4\frac{1}{2}$ per cent according to calculations based on tables for the calculation of values clearly points to well

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known methods of actuarial calculation in which the required integers are certain sums periodically recurring at certain times over a certain period. This provision, in our opinion, is entirely inapplicable to a case where the tenure of the land is of uncertain duration and where the future amounts of rent are at the date of valuation unknown and unascertainable. The section has a sensible plain application to ordinary leases made between subject and subject, and this is its primary purpose. Sec. 27 (3), however, provided that where the lease is a lease from the Crown a lessee of the land shall be assessed and liable for land tax as if the lease were made before the commencement of the Act and not otherwise. This provision would operate to bring under the provisions of sec. 28 such Crown leases as possessed an unimproved value capable of ascertainment according to the method prescribed by sec. 28 (3). But it discloses no intention to bring into the tax any leases which are not capable of such ascertainment, and if it did disclose such an intention it would not be efficacious to do so because in fact the lease would possess no characteristics upon which the statute operates to impose tax or to enable tax to be assessed. The words quoted from sec. 27 came there by amendment made by Act No. 29 of 1914. By the same Act sec. 29 was amended. Up till then sec. 29 had forbidden the taxation of a leasehold estate held under the laws of a State relating to the alienation or occupation of Crown lands not being a perpetual lease without revaluation or a lease with a right of purchase. It is not clear whether a perpetual lease was at that time to be valued under secs. 27 and 28 as they then stood or under the remaining provisions of the Act, but a lease with a right of purchase ordinarily would come within sec. 26. The amendment made by No. 29 of 1914 in sec. 29 consisted, so far as material, in including in the exception a lease of land to be used for pastoral grazing or cultivation purposes or a homestead lease or a mining lease or a timber lease and omitting the words qualifying perpetual lease *videlicet* without revaluation. It will be noticed that this provision merely extends an exception from a prohibition against imposition of tax. It does not in terms impose any tax. In our opinion it would be wrong to construe it as disclosing an intention to impose any tax upon any estate or interest

in cases which would not, apart from the prohibition, come into a category upon which the remaining provisions of the Act impose liability. It follows that it is not enough for the Crown to show that the lease falls within the exception. It is necessary for the Crown to go on and show that the lease is within the class upon which liability is affirmatively imposed. It follows that in our opinion the interest of a lessee under a Crown lease is not liable to be included in his assessment unless its unimproved value is capable of being ascertained under the provisions of sec. 28 (3) which we have already interpreted. It remains to consider whether the interest of the lessees under the lease, which is the subject of the case stated, falls within that provision so interpreted. This lease must be given that operation which the law of Queensland in force at each relevant 30th June gave to it. It is expressed in terms which conform to the laws of Queensland at the date when it was granted. Its term was 29½ years from 1st July 1904 subject to the provisions, &c., of the *Land Acts*. The rent reserved was a sum certain until 1st January or 1st July nearest to the date of the determination of the rent of the holding by the Land Court, and thereafter such yearly rent or sum as the Land Court should from time to time determine for the various periods into which the said term is divided in accordance with the said Act. The periods referred to expired on 1st July 1914, 1st July 1924 and 1st January 1934. The lease further provided that when the amount of rent had been assessed and determined by the Land Court the lessees should pay the arrears. This refers to the fact that the Land Court's assessment of rent if made after the commencement of the period in respect of which it was made related back to that commencement. A corresponding provision occurs in the lease for crediting the lessees should the Land Court's determination be of a less rent than they have in fact paid. Sec. 43 of the Queensland *Land Acts* as now consolidated from 1910 to 1924 provides that every pastoral lease shall be subject to the following conditions: (1) that the lessee shall during the term pay an annual rent at the rate for the time being prescribed; (2) that the rent payable for the second and every succeeding period if any shall be determined by the Court. The Court's power to determine the rent may be

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exercised more than once. Under sec. 44 a power of resumption without compensation is preserved in the case of leases of which this is one. The power was exercisable at certain intervals and in respect of maximum proportions of the total area of the land contained in the lease. These provisions, in our opinion, coupled with the provisions of the lease itself show that on any relevant 30th June it could not be known what the future annual payments of rent were, nor what was the future duration of a tenant's right to enjoy any specific part of the land or of his right to enjoy any area of land other than a minimum area unidentified except by the fact that it must be contained in the total area originally granted. It follows from this that the lease does not fall within sec. 28 (3) as we have interpreted it.

We think the questions in the case should be answered as follows: (1) No; (2) An answer is not required; (3) No; (4) and (5) An answer is not required.

[*Note.*—Since this judgment was delivered the report of the *Commissioners of Inland Revenue* v. *Dickson's Executors* (1) has come to hand. In that case the question for determination was the annual value of property let for a term of years at a fluctuating rental, and it was held that the "rent for the year" at which the properties were let was not the amount of the rent payable for any one particular year of the lease, but that the annual value must be determined by reference to the commercially fixed price for the annual possession of the property ascertained by averaging or otherwise as the circumstances might require.]

ISAACS J. In view of the arguments addressed to us, I may fitly begin what I have to say with a quotation from the judgment of the present Lord Chancellor (then *Sankey* L.J.) in *Tilling-Stevens Motors Ltd.* v. *Kent County Council* (2). The learned Lord Justice said (3):—"First of all, with regard to the canon of construction for taxing Acts, I think that has been laid down with great clarity in two cases by Lord *Halsbury* L.C. In *Lord Advocate* v. *Fleming* (4)

(1) (1928) 14 Tax Cas. 69.
(2) (1929) 1 Ch. 66.
(3) (1929) 1 Ch., at p. 76.
(4) (1897) A.C. 145, at p. 152; 66 L.J. C.P. 41, at p. 42.

he said in dealing with such Acts: 'We have no governing principle of the Act to look at; we have simply to go on the Act itself to see whether the duty claimed under it is that which the Legislature has enacted.' In *Tennant* v. *Smith* (1), an earlier case, he said:—'In a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes. In various cases the principle of construction of a taxing Act has been referred to in various forms, but I believe they may be all reduced to this, that inasmuch as you have no right to assume that there is any governing object which a taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation.'" In *Attorney-General* v. *Seccombe* (2) Lord *Sumner* (then *Hamilton* J.) said: "In construing a taxing Act the presumption is that the Legislature has granted precisely that tax to the Crown which it has described." In *Ormond Investment Co.* v. *Betts* (3) Lord *Atkinson* again said: "The words of the statute must be adhered to, and . . . so-called equitable constructions of them are not permissible."

(1) The lease does not come within sec. 27 because of its date. Nor does it fall within sec. 29. If it came within that section as a lease with right of purchase, the proviso would be important as a guide to its inclusion in sec. 27 or sec. 28, as the case might be.

(2) It falls, in my opinion, within sec. 28. It was made before the commencement of the Act, and at all the relevant times all the legal conditions existed which are required by the section for arriving at the unimproved value of the leasehold. Sec. 12 fixes the relevant time, and the land as owned at that moment by the appellant was definitely ascertainable as a matter of fact. The rent at that moment *rebus sic stantibus*, was definite and known, and if an action had been brought for it, no question as to its certainty could have been raised. So far as the rent was affected by resumption,

(1) (1892) A.C. 150, at p. 154; 61 L.J. P.C. 11, at p. 13.

(2) (1911) 2 K.B. 688, at p. 703.

(3) (1928) A.C. 143, at p. 162.

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the State Act provided for its adjustment (sec. 154). The circumstance that it might be considered retrospectively so as to be greater or less, would have afforded no answer to a present action. The unexpired period of the lease was ascertainable by a mere arithmetical calculation. But it was strenuously argued for the appellant that no "annual rent" had been reserved. As to reservation, it would be a waste of time to dwell upon the word "reserved." The only matter of any substance is whether the rent payable was an "annual rent" within the meaning of sec. 28 (3) of the Federal Act. One may ask: Does the lease reserve no annual rent at all? If it does not, what is its effect? The State Act calls it rent, and therefore the State law makes it rent, and makes it an "annual rent" (sec. 43 (1)). But because the State Act also says that the rent payable for the second and third periods—although primarily "prescribed"—shall be determined by the Court, and (since 1920) permits the Court to do so retrospectively, it was said there is no "annual rent" reserved by the lease within the meaning of the sub-section. In my opinion the objection is not a sound one. If we are to have regard to "the lease" itself, it contains nothing about retrospective alteration. Had the 1920 amendment of the statute not been passed—and it had not been passed when most of the relevant periods were reached—it could not be said that the lease did not reserve an "annual rent," unless some meaning be given to that expression that hitherto it has not received. The lease definitely prescribes an annual rent, which in certain events may be altered. An annual rent does not mean an invariable rent: it means simply a rent that is payable annually, or for the period of a year. (See, for instance, *Hill* v. *Grange* (1) and 3 *Cruise*, tit. 28, ch. 1, secs. 46-49.) In *Selby* v. *Greaves* (2) *Willes* J. said: "It is new to me that a rent is uncertain because it cannot be ascertained at the time of the demise what rent will become payable on a future contingency." In *Daniel* v. *Gracie* (3) Lord *Denman* C.J. quotes *Co. Litt.* as showing "there may be a certainty in uncertainty," so long as the rent may be reduced to a certainty, even by events which only become certain during the

(1) (1556) 1 Plowd. 164.
(2) (1868) L.R. 3 C.P. 594, at p. 602.
(3) (1844) 6 Q.B. 145, at p. 152.

year. (See per *Farwell* L.J. in *Holwell Iron Co.* v. *Midland Railway* (1).)

Up to the 1920 legislation I cannot understand how on any principle consistent with long recognized law it could be said there was no annual rent reserved by the lease. I am equally unable to see how the statutory power to revise annual rents, even retrospectively, which a legislature may give, makes whatever sum is otherwise an annual rent cease to be an annual rent. What else is it? Is it no rent? If a rent, is it not annual? I can see no ground for answering those questions in favour of the appellant. On the contrary, there are strong reasons for adhering to the exact words of the Act. One is that it is inconceivable the Legislature meant to exempt large pastoral holdings all over Australia on one branch of the argument, and at least a vast territory in Queensland on the other. Practically, the arguments of the taxpayers, if acceded to, would leave few or no Crown leases taxable.

I should advert to one argument used in support of the appellant's case. It was that the "annual rent" forming the subtrahend in par. (*a*) of sec. 28 (3) of the Federal Act could not be ascertained with reference to this lease. If that were true, every lease with a possibly fluctuating rent would be outside the section. But the answer is that the "annual rent" is with reference to a given year the rent payable for that year. There was never a moment in the lifetime of the lease when it could not be said truly, "the annual rent for any given year is so much." One would, after 1920, have to add this may or may not be allowed, but at the moment of valuation there is a definite amount payable for rent. And so for every succeeding year. That is the command of the competent Legislature with respect to the taxation, and, in my opinion, it must be followed without any question as to its consequences. As to the definiteness of the term, see *Lewis* v. *Baker* (2) and *Mayo* v. *Joyce* (3).

I quite recognize that State legislation and administration, based on varying local policies of development, give rise to very special and even unusual terms in Crown leases. But the Federal Parliament

(1) (1910) 1 K.B. 296, at p. 312. (2) (1906) 2 K.B. 599, at p. 603.
(3) (1920) 1 K.B. 824.

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was well aware of that, and has used language which, in my opinion, is comprehensive enough to embrace all varying forms of lease, and still sufficiently elastic to apply to all.

The solution of possible difficulties such as have been pointed out in this instance is, in my opinion, to be found, not in exempting vast territories and thereby introducing inequality of taxation, but in giving effect to the provision for prescribing tables for calculating values. The Legislature there, as I read the sub-section, has provided a practical means for meeting all sorts of difficulties of the nature referred to. The regulations may be so moulded as to apply to any form of annual rental variation.

(3) Yes; the unexpired period is unaffected by a Land Court assessment.

(4) On 30th June 1914 the unexpired period was 19½ years.

(5) The prescribed tables are to be applied to the amount constituting remainder obtained by subtracting the annual rent from 4½ per centum of the unimproved value of the land, so as to obtain the statutory value at the relevant midnight of 30th June of the amount referred to for the unexpired value of the lease.

STARKE J. The *Land Tax Assessment Act* 1910-1916 prescribed that land tax should be levied and paid upon the unimproved value of all lands within the Commonwealth owned by taxpayers and not exempt from taxation. During the period from 21st December 1914 to 1st July 1923 (see Acts No. 29 of 1914 and No. 29 of 1923) the owner of a leasehold estate under the laws of a State, or part of the Commonwealth, relating to mining (not being a perpetual lease or a lease with a right of purchase, or a lease of land to be used for pastoral grazing or cultivation purposes or a homestead lease or a mining lease or a timber lease) was not liable to assessment or taxation in respect of the estate.

In 1904 the Crown granted to the predecessors in title of the taxpayers, the appellants in the present case, certain Crown lands known as Northampton Downs, in the State of Queensland, for pastoral purposes, pursuant to the Land Acts of that State, which were laws relating to the alienation and occupation of Crown lands.

The owners of this leasehold estate were not within the exemption from taxation accorded by the enactments of 1914 and 1923 already mentioned, and were, therefore, prima facie liable to assessment and taxation during the years those enactments were in operation.

We must now examine the provisions of the *Land Tax Assessment Act* for the assessment of leasehold estates. They are to be found in secs. 27 and 28 of the Act of 1910-1916. The relevant provision of sec. 27 is sub-sec. 3, which enacts that in case the lease is a lease from the Crown a lessee shall be assessed and liable for land tax as if the lease were made before the commencement of the Act, and not otherwise. Then sec. 28 provides (sub-sec. 2) that the owner of a leasehold estate in land under a lease made before the commencement of the Act shall be deemed to be, in respect of the land, the owner of land of an unimproved value equal to the unimproved value (if any) of his estate. And sub-sec. 3 prescribes that "for the purposes of this section—(*a*) the unimproved value of a lease or leasehold estate in land means the value of the amount (if any) by which four and a half per centum on the unimproved value of land exceeds *the annual rent reserved by the lease*, calculated for the unexpired period of the lease at four and a half per centum, according to the calculations based on the prescribed tables for the calculation of values: Provided that the Commissioner may from time to time, if he thinks fit, alter the rate per centum upon which the calculations in this section are based." The calculations relevant to this case give tables whereby the present value of £1, payable for any number of months up to five years, and for any number of years up to a hundred, may be ascertained at the rate of $4\frac{1}{2}$ per cent per annum. Land tax is levied in and for each financial year, and is charged on land as owned at noon on 30th June immediately preceding the financial year in and for which the tax is levied. Assessments must be made by the Commissioner for the purpose of ascertaining the amount upon which land tax is levied.

Now, these provisions necessarily contemplate an annual rent reserved by the lease which either is certain or can be reduced to

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a certainty during the unexpired period of the lease; it may, no doubt, fluctuate, so long as the amount and duration of the fluctuation can be certainly ascertained from the lease. The unimproved value of the leasehold estate the subject of the taxation depends upon the rent, and unless it be definitely fixed, or clearly ascertainable from the lease, the calculation prescribed by the Act cannot be made. Or, to put the case in other words, you cannot calculate the present value of rent over an extended period unless you know the amount of the rent payable during the period. It is not enough to say that, in a given financial year, rent is fixed by the lease which will continue, unless otherwise determined, for the statute contemplates and requires, for the purposes of the calculation, an ascertained or ascertainable rent reserved over the unexpired period of the lease.

Turning to the terms of the particular lease referred to in the case. It is a lease for and during the term of 29½ years, to be computed from 1st July 1904, yielding and paying to the Crown £447 16s. 11d. on the 1st January or the 1st July nearest to the determination of the rent of the holding by the Land Court, and thereafter such yearly rent or sum as the Land Court shall from time to time determine for the various periods into which the term is divided in accordance with the Queensland *Land Acts*. Provided that until the rents for the various periods, if any, subsequent to the first, shall have been assessed and determined by the Land Court, the lessee shall continue to pay the same amount of rent as theretofore paid by the lessee, or the minimum rent prescribed by the 64th section of the Queensland *Land Act* 1897, whichever shall be the greater.

The provisions governing the determination of rent are to be found in the Queensland *Land Acts* of 1897, 1902 and 1910-1924, secs. 42, 43, 125 and 128. The effect of these provisions is as follows:—Where the term of any pastoral holding exceeds ten years, that term shall be divided into periods; the last period shall be of such character as will permit the other period, or each other period as the case may be, to be of the duration of ten years. The lessee shall during the term pay an annual rent for the time being

prescribed. The rent payable for the second and each succeeding period, if any, shall be determined by the Court. Certain principles are set forth for the guidance of the Court in determining the rent of a pastoral lease, and until the rent is so determined the lessee must pay the same amount of rent as theretofore. But when the amount of rent is determined by the Court, the lessee shall pay any arrears of rent found due by him at the rate so determined, so as to adjust the balance due to the Crown, and any excess in payment by the lessee shall be credited to him in payment of rent which may subsequently become due in respect of the holding, or, at his request, be refunded to him.

In the matter before us, as the case states, the term of the lease was, pursuant to these provisions, divided into three periods, the first of which would expire on 30th June 1914, the second on 30th June 1924, and the third on 31st December 1933. The rent reserved in the lease, £447 16s. 11d., was fixed pursuant to the provisions of the *Land Act* 1902, that payable for the second period was determined by the Land Court at 63s. 9d. per square mile and later at 95s. per square mile, but that payable for the third period has never yet been determined. In these circumstances, the formula of the *Land Tax Assessment Act* for determining the present value of the rent reserved by a lease cannot, in my opinion, be applied. The data upon which that calculation is to be made is non-existent as to the third period of the present lease: the rent for that period may be higher or lower than the rent mentioned in the lease, and the present value of the rent reserved by the lease must vary as that figure varies. The formula of the Acts is, however, the only method allowed by the Acts for ascertaining the unimproved value of the lease or the leasehold estate in the land. The taxpayer, I apprehend, has a right to stand upon the literal construction of the Acts, whatever may be the consequence (*Pryce* v. *Monmouthshire Canal & Rail Cos.* (1), and if there is a case not covered by the Acts, so construed, that can only be cured by legislation, and not by forced applications of the Acts (*Attorney-General* v. *Earl of Selborne* (2)).

(1) (1879) 4 App. Cas. 197.

(2) (1902) 1 K.B. 388, at p. 396.

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For these reasons I agree with the answers proposed by the Chief Justice and my brothers *Gavan Duffy* and *Rich* to the questions propounded in the case.

Questions answered as follows:—(1) *No.* (3) *No. It is unnecessary to answer* (2), (4) *and* (5).

Solicitors for the appellants, *Whiting & Byrne*, Melbourne, by *McLachlan, Westgarth & Co.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

[HIGH COURT OF AUSTRALIA.]

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

AND

THE WEST AUSTRALIAN TRUSTEE EXECUTOR AND AGENCY COMPANY LIMITED . . . . . } RESPONDENT.

H. C. OF A. 1929. PERTH, *Sept* 13, 17. KNOX C.J., RICH and DIXON JJ.

Income Tax—Appeal from Board of Review—Incompetence—Alteration of assessment after Board's decision—Income Tax Assessment Act 1922-1928 (*No.* 37 *of* 1922—*No.* 46 *of* 1928), *secs.* 44 (1), 51 (4)—*Income Tax Regulations* (*Statutory Rules* 1927, *No.* 159), *reg.* 45.

The Board of Review, by a decision in writing dated 30th May 1928 and communicated to the taxpayer on 6th June 1928, determined in the taxpayer's favour a reference upon objection to an assessment. On 12th November 1928 the Deputy Commissioner issued a notice of amended assessment notifying an alteration of the assessment objected to. By the alteration the tax was assessed at the same amount as the Board had determined. On 29th November 1928 the Commissioner gave notice of appeal to the High Court against the Board's decision.

Held, that the appeal was incompetent.