[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN MERCANTILE LAND AND FINANCE COMPANY LIMITED . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1929.

MELBOURNE, *Mar.* 4-8, 15.

Rich J.

Income Tax (Cth.) — Lessee — Pastoral leases — Indebtedness of original lessees to company—Surrender of leases to company in consideration of release of debt—Surrender by company of pastoral leases to Crown—Acquisition by company of new leases under Western Lands Acts (N.S.W.) for extended term—Original pastoral leases expiring in 1918*—Western Lands leases expiring in* 1943*— Deduction for* 1922-1923*—Whether surrender of leases constituted "any fine, premium or foregift" paid in respect of the Western Lands leases—"Payment of an amount"—Meaning of—Interpretation of Act—Misdirection of Commissioner—Form of order to be made by Court—Income Tax Assessment Act* 1922 *(No.* 37 *of* 1922)*, secs.* 23 (1) (*h*) (ii.), 25 (*i*).

The appellant was a company to which between 1891 and 1904 persons entitled to pastoral leases in the Western District of New South Wales were indebted, which indebtedness was secured over (*inter alia*) the debtors' right to the pastoral leases. The debtors, save in two cases (one being where the appellant foreclosed), assigned the equity of redemption in the leases to the company in consideration of a release of the liability. Subsequently the appellant caused the leases, which would otherwise have expired in 1918, to be brought under the *Western Lands Acts* (N.S.W.), and thereby obtained an extension of the terms until 1943. As a result the Crown issued to the appellant a "Western Lands lease" in respect of each leasehold, which recited (*inter alia*) that the appellant had surrendered to the Crown the lands comprised in the former leases, and proceeded to grant to the appellant a new lease of the land in question. These leases were still in force, and the appellant, which was still the leaseholder, sought to deduct some allowance from its taxable income for the financial year 1922-1923 in respect of the consideration which it gave for its present right in the land.

H. C. OF A. 1929.

AUSTRALIAN MERCANTILE LAND AND FINANCE CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Held, (1) that, save in the case of the property acquired by foreclosure, the transaction in 1891 involved a payment of an amount for the assignment or transfer of property which included the right to the leases (*Maillard* v. *Duke of Argyle*, (1843) 6 Man. & G. 40, applied); (2) that the satisfaction of a definite pecuniary sum due to the assignee of the lease was a "payment of an amount" within the proviso to sec. 25 (*i*) of the *Income Tax Assessment Act* 1922; (3) that it was for the Commissioner and not for the Court to say what in point of fact was paid for the actual assignment or transfer of the leases as distinct from payments for the assignment of other property; (4) that when the Commissioner misdirects himself upon the meaning of a section in the Act which constitutes him the judge of the facts, the proper course for the Court to take is not to substitute its judgment for his, but to set aside his decision and remit the matter to him with appropriate declarations for his reconsideration; (5) that the provision in sec. 25 (*i*) of the *Income Tax Assessment Act* 1922 which gives the taxpayer a deduction of "the amount obtained by dividing the sum so paid by the number of years of the unexpired period of the lease at the date the amount was so paid" contemplates the existence of a definite term when the consideration for the assignment is given and refers to an amount paid for the right to enjoy that term, and provides for the distribution of that amount over the term by a simple proportion sum in which the period gives the divisor: it shows that the Legislature contemplated a definite apportionment over the residue of a definite term of the consideration given for that term, and an extension of the term, even under an option included in the lease, does not come within this provision; (6) that the leases granted under the *Western Lands Acts* did not express a legislative extension of a continuous term of years, but were new grants of new terms; (7) that the surrender by the appellant of the original leases in exchange for the Western Lands leases did not amount to the payment by the appellant of "a fine, premium or foregift, or consideration in the nature of a fine, premium or foregift for a lease, or a renewal of a lease," within the meaning of sec. 25 (*i*) (*Waite* v. *Jennings*, (1906) 2 K.B. 11, at pp. 17-18, considered and applied); and consequently (8) that assuming a sum to be fixed as an amount paid for the assignment or transfer of the pastoral leases, no part of such sum could be considered as an amount paid for the leases current under the *Western Lands Acts* for the purpose of allowing a proportion to be deducted under sec. 25 (*i*) of the *Income Tax Assessment Act* 1922 from the assessable income for the financial year 1922-1923, as the original leases would not have endured beyond 1918.

APPEAL to the High Court from the Federal Commissioner of Taxation.

The appellant, the Australian Mercantile Land and Finance Co. Ltd., lodged with the Commonwealth Commissioner of Taxation an objection against its amended assessment for income tax for the financial year 1922-1923, and, being dissatisfied with the Commissioner's decision on the objection, requested him to treat the objection

as an appeal and to forward it to the High Court pursuant to sec. 50 (4) of the *Income Tax Assessment Act* 1922, which the Commissioner accordingly did.

The objections to the assessment were substantially (1) that the assessment was excessive, (2) that no allowance had been made for depreciation of the Company's leases, (3) that no allowance had been made for subscriptions made by the Company, and (4) that no allowance had been made for legal expenses paid by the Company.

The appeal was heard by *Rich* J., in whose judgment the facts and arguments sufficiently appear.

C. Gavan Duffy and *Fullagar*, for the appellant.

H. I. Cohen K.C. and *Norman O'Bryan*, for the respondent.

Cur. adv. vult.

Mar. 15.

RICH J. delivered the following written judgment :—

This appeal is concerned with the income tax assessment of the Company for the financial year 1922-1923. The Company claimed to be entitled to deductions from its assessable income which the Commissioner disallowed. They fell into three classes. Those of the most important class were claimed under the proviso to par. (*i*) of sec. 25 of the *Income Tax Assessment Act* 1922. This enactment reads as follows :—" A deduction shall not, in any case, be made in respect of any of the following matters : (*i*) any wastage or depreciation of lease or in respect of any loss occasioned by the expiration of any lease : Provided that where it is proved to the satisfaction of the Commissioner that any taxpayer (being the lessee under a lease or the assignee or transferee of a lease) has paid any fine, premium or foregift, or consideration in the nature of a fine, premium or foregift for a lease, or a renewal of a lease, or an amount for the assignment or transfer of a lease of premises or machinery used for the production of income, the Commissioner may allow as a deduction, for the purpose of arriving at the income, the amount obtained by dividing the sum so paid by the number of years of the unexpired period of the lease at the date the amount

H. C. OF A. 1929.

AUSTRALIAN MERCANTILE LAND AND FINANCE CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

was so paid, but so that the aggregate of the deductions so allowed shall not exceed the sum so paid if paid on or after the thirtieth day of June, one thousand nine hundred and fourteen, or the part of the sum so paid which is proportionate to the unexpired period of the lease from the thirtieth day of June, one thousand nine hundred and fourteen if the sum were paid prior to that date."

It appears that between the years 1891 to 1904 certain persons entitled to pastoral leases in the Western District of New South Wales were indebted to the Company in very large sums of money. This indebtedness was secured over various forms of property including their right to the pastoral leases and in one case also a right to a homestead lease and in another to an artesian well lease. The debtors in each of these cases, save two, arrived at an arrangement with the Company by which the amount of the liability was ascertained and the debtor's equity of redemption in the property over which the liability was secured was assigned to the Company in consideration of a release from the liability. In one case a similar arrangement was made and carried out with the addition that a small cash payment was made by the Company to the debtor. In the remaining case the Company brought a foreclosure suit and obtained a decree absolute. After the Company had in this manner acquired the right to the leases in question formal grants were issued under the hand of the Governor of New South Wales, in some cases in the name of the Company, in others in the names of predecessors in title. Each of these recited that the Company (or its predecessor in title as the case may be) being entitled to a pastoral lease of the land described in a schedule thereto had required the issue of the grant in testimony thereof, and proceeded to express a grant to it and its lawful assigns of a pastoral lease "upon such conditions as to the payment of rent or otherwise and for such term as from time to time may have been or may hereafter be enacted defined and prescribed by the *Crown Lands Act of* 1884 or the *Crown Lands Act of* 1889 or any Act amending or replacing the same and by any regulations made under any such Act." It appears that if the provisions of the *Western Lands Acts* had not been enacted and availed of each lease would have expired in the year 1918. I suppose because of the combined effect of sec. 29 of the *Crown Lands Act*

1889 and sec. 7 of that of 1895. But by the *Western Lands Acts* No. 70 of 1901 and No. 38 of 1905 it was enacted that a registered holder under the *Crown Lands Acts* of (*inter alia*) a pastoral lease of land in the Western Division might apply to bring his holding under the provisions of the *Western Lands Acts*, and further that, upon application in the prescribed manner, the Governor might extend the term of any lease (*scil.*, lease under the *Western Lands Acts*) up to 30th June 1943. Pursuant to these provisions the Company caused its pastoral leases to be brought under the *Western Lands Acts* and applied for extension of the terms to 30th June 1943. As a result the Crown issued "Western Lands leases" in respect of each leasehold. These recited that the Company had applied to bring the relevant pastoral lease under the *Western Lands Act* 1901, that the application had been duly granted, and that the Company had applied for an extension of the term up to 30th June 1943 and that that application was duly granted, and proceeded—"whereupon the said Australian Mercantile Land and Finance Company Limited assigned surrendered and yielded up unto us Our Heirs and Successors all the lands comprised in the said lease together with the said indenture of lease, and all things required by law were done to enable an extension of the said lease to be made in manner hereinafter appearing: Now know ye that in pursuance of the provisions of the said *Western Lands Act* 1901 and in conformity with the same: We do hereby grant unto the said Australian Mercantile Land and Finance Company Limited (which, with its assigns, is hereinafter referred to as the lessee) a lease for pastoral purposes under the said Act of all that piece or parcel of land" &c. These leases are still in force and the Company is still the leaseholder. It seeks to deduct some allowance in respect of the consideration which it gave for its present right in the land.

Mr. *Gavan Duffy*, who appeared for the taxpayer, contended that the transaction in 1891 involved a payment of an amount for the assignment or transfer of property which included the right to the lease. This view, save in the case of the property acquired by foreclosure, appears to me to be well founded. The transaction included the ascertainment of a money sum and its satisfaction by

H. C. OF A. 1929.

AUSTRALIAN MERCANTILE LAND AND FINANCE CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

the assignment of money's-worth. As *Maule* J. said in *Maillard* v. *Duke of Argyle* (1), "payment is not a technical word; it has been imported into law proceedings from the exchange, and not from law treatises. . . . You may support a plea of payment, by showing that a person agreed to accept a horse from another in satisfaction, and the same as to goods, provided the agreement was to take the articles as *money*." The satisfaction of a definite pecuniary sum due to the assignee of the lease seems to me fairly to come within the meaning of the words "payment of an amount" used in par. (*i*) of sec. 25. (See *Encyclopædia of the Laws of England*, *sub voce* "Payment.") But it is one thing to say that the total sum of which the Company discharged a debtor in consideration of an assignment of a mass of property including a lease is an amount paid for the assignment, and another to say how much was the amount paid for the assignment or transfer of the lease. In this connection it should be noticed that the paragraph requires that it should be proved to the satisfaction of the Commissioner that the taxpayer paid such an amount. When the Commissioner misdirects himself upon the meaning of a section which, as this appears to do, constitutes him the judge of the facts (subject only to the Board of Review), the proper course for the Court to take is not to substitute its judgment for his but to set aside his decision upon the taxpayer's objections and remit the matter to him with appropriate declarations for the reconsideration of the Commissioner and, if the taxpayer requires his new decision to be referred, the consideration of the Board of Review. With this view in mind, I admitted a number of documents which by reason of their age required no verification, all of which were proper for the Commissioner's consideration, but some of which, in spite of Mr. *Gavan Duffy's* ingenious reliance upon the rules relating to declarations against interest and in the course of duty and presumption of death, may not be lawful evidence of the facts they state. In my opinion it is for the Commissioner, and not for me, to say what in point of fact was paid as amounts for the assignment or transfer of the leases (cf. *Dalrymple* v. *Federal Commissioner of Taxation* (2); *Robinson* v. *Federal Commissioner of Taxation* (3)). But, upon the assumption that a sum is fixed

(1) (1843) 6 Man. & G. 40, at p. 45. (2) (1924) 34 C.L.R. 283, at p. 293.
(3) (1927) 39 C.L.R. 297, at p. 299.

as an amount for the assignment or transfer of the pastoral leases, there remains the question whether it or any part of it can be considered as an amount paid for the leases now current so that a proportion is allowable as a deduction from the assessable income for the year of earning ending 30th June 1922. The assumed amount was paid for a lease which upon the law as it then stood could not endure beyond 1918.

Par. (*i*) of sec. 25 gives the taxpayer a deduction of the " amount obtained by dividing the sum so paid by the number of years of the unexpired period of the lease at the date the amount was so paid." These words seem to show that the Legislature contemplated a definite apportionment over the residue of a definite term of the consideration given for that term. It is difficult to see how an extension of a term even under an option included in the lease could be treated as coming within this view. The amount of consideration given for the lease may have been influenced by the existence of the option, but it could not be said that it was paid for the renewal resulting from its exercise, nor could it be said that the term for which the renewal was given was part " of the unexpired period of the lease at the date the amount was so paid." Mr. *Gavan Duffy*, however, endeavoured to meet these difficulties by an argument as able as it was attractive. He said, in effect, that the original pastoral lease was for no definite term, but for such a term as the law might from time to time fix. For this he rested upon the words of the grant I have quoted. His argument proceeded that the law finally fixed the term by the *Western Lands Acts* 1901-1905 as one expiring 30th June 1943. I find myself unable to give effect to this answer. It appears to me to over-emphasize the terms of the original grant and to pay insufficient attention to the language in which par. (*i*) of sec. 25 is expressed. That paragraph contemplates the existence of a definite term when the consideration for the assignment is given. It is dealing with an amount paid for the right to enjoy that term, and provides for the distribution of that amount over the term by a simple proportion sum in which the period gives the divisor. Subject to the criticism that correct views of conveyancing should not prevail over the substantial policy of a taxing Act, it may be further said that in

H. C. OF A. 1929.

AUSTRALIAN MERCANTILE LAND AND FINANCE CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

fact the leases granted under the *Western Lands Acts* do not express a legislative extension of a continuous term of years, but are new grants of new terms. Mr. *Gavan Duffy*, however, sought to avoid the difficulty which the portion of sec. 25 (*i*) so far dealt with created, by availing himself of the character of the lease and insisting that his client came within the earlier portion of par. (*i*) and in surrendering its old leases for new terms of years had " paid " a " fine, premium or foregift, or consideration in the nature of a fine, premium or foregift for a lease, or a renewal of a lease." The word " paid " is not itself appropriate to include considerations such as a surrender of a lease. But perhaps this not inflexible word should receive a very wide meaning, having regard to the words which follow it and the character of the provision. The substantial question raised by this contention appears to me to be whether the surrender of the leases amounts to " a consideration in the nature of a fine, premium or foregift." The answer to this question is aided by an examination of the legislation from which these words were adapted. They seem to have come from sec. 28 (3) (*b*) of the *Land Tax Assessment Act* 1910-1914 into the *Income Tax Act* 1915 in sec. 20 (*i*). At the same time similar words were taken into sec. 14 (*d*).

It may be supposed that in the *Land Tax Assessment Act* they were taken from the definition of " fine " in sec. 2 (ix.) of the English *Conveyancing and Law of Property Act* 1881. In discussing the application of this definition to the well-known provision of the English Act of 1892 which imports into a lessee's covenant not to assign without the lessor's consent a proviso against exacting a fine, *Fletcher Moulton* L.J. said in *Waite* v. *Jennings* (1) :—" In other words, the Legislature declares that the power to refuse consent to assign is not to be made a source of profit to the lessor. But if the Legislature thought the evil sufficiently great to justify its interference I cannot believe that it would be content to limit the remedy to a case of the payment of money, and we see that this is so when we turn to sec. 2, sub-sec. 9, of the *Conveyancing Act* 1881. That sub-section contains a definition of a ' fine ' which makes that expression include ' premium or foregift, and any payment, consideration, or benefit in the nature of a fine, premium, or foregift.'

(1) (1906) 2 K.B. 11, at pp. 17-18.

Looking at the terms of this definition, I am of opinion that it is expressly intended thereby to make the word 'fine' when used in these Acts include any valuable consideration given or required under such circumstances that, if it were money, it would be what is commonly known as a 'fine.' The phrase 'in the nature of a fine' when applied to the case of obtaining consent to assign, means nothing more than 'paid as the price for' such consent." All that his Lordship said in that case was not concurred in by the other Lords Justices on the Bench; but he reaffirmed these views in *Andrew* v. *Bridgman* (1), and they appear to be approved by *Isaacs* J. in *Dalrymple* v. *Federal Commissioner of Taxation* (2). For the purpose in hand they afford a useful and no doubt a correct statement of the object and effect of the language with which I am concerned. The important element in the description "consideration in the nature of a fine, premium or foregift" is that it involves a reward to the lessor for the grant of the particular interest or benefit obtained by the lessee. Now, in this case it is clear that the surrender of the leases expiring in 1918 was not a reward to the lessor at all. It was merely a necessary preliminary to the grant of new terms of years in respect of the same land. For these reasons Mr. *Gavan Duffy's* alternative contention cannot prevail. I am, therefore, of the opinion that the appellant Company is not entitled to any deduction from the assessable income earned in the year ending 30th June 1922 under par. (*i*) of sec. 25.

The second claim by the appellant Company was for the allowance of deductions under par. (*h*) (ii.) of sec. 23 (1), which provides that in calculating the taxable income of a taxpayer the total assessable income derived by the taxpayer shall be taken as a basis and there shall be deducted ((*h*) (ii.)) gifts exceeding £5 each made, during the year in which the income was derived, to public charitable institutions, if the gifts are verified to the satisfaction of the Commissioner. Some of the deductions claimed were obviously inadmissible because under £5. Some, however, of those over £5 were gifts to institutions probably charitable according to the legal meaning of that word. The Commissioner decided the appellant's objection at a time when

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

(2) (1924) 34 C.L.R. 283.

H. C. OF A. 1929.

AUSTRALIAN MERCANTILE LAND AND FINANCE CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Rich J.

Swinburne v. *Federal Commissioner of Taxation* (1) still expressed the law, and upon that authority his decision would probably be right. The facts were not thoroughly investigated before me, and, indeed, in view of the concluding words of the paragraph it is the Commissioner's function and not mine to be satisfied of the verification of the gifts whatever that phrase may include. As *Swinburne* v. *Federal Commissioner of Taxation* has now been overruled by the Privy Council in *Adamson* v. *Melbourne and Metropolitan Board of Works* (2), I propose to set aside the Commissioner's decision upon the items claimed as deductions under par. (*h*) (ii.) of sec. 23 and remit so much of the objections to him for reconsideration.

The remaining deductions claimed by the taxpayer at the hearing were not all claimed in the notice of objection. Certain legal expenses were said to come under sec. 23 (1). It is enough to say that the evidence does not satisfy me that any of them was money wholly and exclusively laid out or expended for the production of assessable income within sec. 25 (*e*).

Order that so much of the decision of the Commissioner as relates to the allowance of deductions under sec. 23 (1) (*h*) (ii.) *of the Income Tax Assessment Act* 1922-1923 *be set aside and the matter thereof be remitted to him for reconsideration. Save as aforesaid appeal dismissed with costs.*

Solicitors for the appellant, *Whiting & Byrne.*

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

H. D. W.

(1) (1920) 27 C.L.R. 377.

(2) (1929) A.C. 142.