

[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION APPELLANT ;

AND

AUSTIN WILLIAM AUSTIN RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. *Income Tax (Cth.)—Assessment—Rate of tax—Average tax—Retirement of taxpayer*
 1932. *from occupation—Income of taxpayer permanently reduced to an amount which*
 ~~~~~ *is less than two-thirds of average taxable income—No taxable income received for*  
 MELBOURNE, *one year—Method of determining rate of tax—Income Tax Assessment Act 1922-*  
 Oct. 4. *1929 (No. 37 of 1922—No. 11 of 1929), sec. 13 (9).*

SYDNEY,  
 Nov. 21.

Gavan Duffy  
 C.J., Rich,  
 Starke, Dixon  
 and McTiernan  
 JJ.

Sub-sec. 9 of sec. 13 of the *Income Tax Assessment Act 1922-1929* contains the following provisions :—"Where a taxpayer establishes that, owing to his retirement from his occupation, or from any other cause, his taxable income has been permanently reduced to an amount which is less than two-thirds of his average taxable income, he shall be assessed, and the provisions of this section shall thereafter apply, as if he had never been a taxpayer in a previous year. For the purposes of this sub-section, 'average taxable income' means the average taxable income by reference to which the taxpayer's rate of tax would be calculated apart from the provisions of this sub-section, if there were excluded from his assessable income of the average years any income received by him from sources from which he does not usually receive income."

During the year ending 30th June 1926 a taxpayer retired from his occupation. His taxable income derived in that year was unaffected, but, in the next year, he had no taxable income and accordingly was not assessed for the ensuing financial year which began on 1st July 1927. During that year he derived a considerable taxable income upon which he was assessed for the financial year beginning 1st July 1928, but he did not obtain the benefit of sub-sec. 9. His taxable income derived during that year, viz., the year ending 30th June 1929 proved less than two-thirds of his average taxable income calculated for the five preceding years ending with the commencement of that year, but

greater than his average taxable income calculated for the five preceding years ending with the termination of that year. For the purpose of his assessment for the ensuing financial year, which began 1st July 1929, he claimed that sub-sec. 9 should be applied.

*Held*, by Gavan Duffy C.J., Rich, Dixon and McTiernan JJ. (Starke J. dissenting):—(1) That he was not entitled to be assessed as if he had never been a taxpayer in a year previous to the financial year beginning 1st July 1929, because sub-sec. 9 does not mean that a comparison shall be instituted between the taxable income under assessment, and two-thirds of the average taxable income of the average years ending with the commencement of the year in which the income under assessment was derived, viz., in this case 1st July 1928; the comparison is required between the taxable income of a given year and two-thirds of the average taxable income of the average years ending with the termination of that year, viz., in this case 30th June 1929; but (2) that he was entitled to be assessed for the financial year beginning 1st July 1929 as if he had never been a taxpayer in a year previous to the financial year beginning 1st July 1927, although, owing to the absence of taxable income in the previous year, he had not been assessed for that financial year. Sub-sec. 9 applies to a case where the reduction is so great as to leave no taxable income. If, therefore, in the year in which the taxable income reflects the reduction, there is no taxable income, and if in the ensuing year the cause and permanence are established, then in the succeeding years the taxpayer must be assessed as if before that year he had never been a taxpayer. Further, notwithstanding that since the reduction, the taxpayer has allowed a year or more to pass without establishing his right to be assessed as if he had never been a taxpayer before the year of reduction, yet, when the rate of tax is calculated for a subsequent year, he is entitled to insist that the calculation shall be made upon that footing, viz., that prior to the year of reduction he had never been a taxpayer. Although under sub-sec. 9 unusual receipts may be excluded in calculating the average taxable income, there is nothing to authorize a similar treatment of unusual deductions.

Decision of the Supreme Court of Victoria (*Lowe J.*): *Austin v. Federal Commissioner of Taxation*, (1932) V.L.R. 335, reviewed.

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#### APPEAL from Supreme Court of Victoria.

This was an appeal from the decision of *Lowe J.* delivered upon certain mutual admissions of fact which, in substance, are as follows:—(1) The appellant is the son of and an executor and trustee of the estate of William Austin deceased. (2) The said William Austin died on 10th July 1929. (3) From 31st December 1913 onwards until the dissolution thereof, the said William Austin and the appellant, under and in pursuance of an indenture of partnership dated 31st December 1913, carried on business in partnership





But he was not assessed for Federal income tax in respect of such income as the excess of deductions claimed in the return submitted by him and allowed by the respondent resulted in his having no taxable income for the said year. The material contents of the return submitted as aforesaid were as follows :—

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|------------------------------------|---------|--------|----|---|
| Income                             | .. .. . | £1,957 | 0  | 0 |
| Deductions were given amounting to | ..      | 1,672  | 9  | 7 |
| Net income as returned             | .. ..   | £284   | 10 | 5 |

The net income so returned was less than the statutory exemption of £300 by £15 9s. 7d. (9) A part (namely the sum of £992) of the said amount of £1,628 paid by the said William Austin for State income tax during the year ended 30th June 1927 and claimed and allowed as a deduction from his assessable income for that year was refunded to him during the year ended 30th June 1928. (10) The said William Austin made a return of the income derived by him during the year ended 30th June 1928. (11) For the financial year 1928-1929 based on income derived during the year ended 30th June 1928 the respondent assessed the taxable income of the said William Austin under the said Act upon which income tax should be levied in the sum of £4,037. (12) The rate of tax for the said financial year was determined by the respondent as set forth in accompanying sheets. (13) On 20th March 1929 the said William Austin, being dissatisfied with the said assessment, lodged with the respondent an objection in writing against the said assessment. (14) The respondent considered the said objection and disallowed the same. By letter dated 2nd May 1929 the respondent disallowed the said objection dated 20th March 1929. (15) By letter dated 15th May 1929 the said William Austin withdrew his objection under protest. (16) The appellant made a return of the income derived by the said William Austin during the year ended 30th June 1929, a copy of which is marked with the letter "I" and forms part of these admissions. In such return an arithmetical error was made in that the total deductions claimed were shown to amount to the sum of £484 instead of £454. The said return also showed that a mortgagor (one H. T. Bently) paid only £90 instead of £180 due by him as interest during the said year. (17) For the



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financial year 1929-1930, based on income derived during the year ended 30th June 1929, the respondent in the first place assessed the taxable income of the said William Austin under the said Act, upon which income tax should be levied, in the sum of £2,651, such sum being arrived at by including as assessable income the sum of £3,135 shown in the return marked "I" and allowing deductions amounting to £484 as claimed in such return. (18) The rate of tax for the said financial year was determined by the respondent as set forth in the accompanying sheets. (19) The appellant, being dissatisfied with the said assessment, duly lodged with the respondent an objection in writing against the said assessment. (20) The respondent considered the said objection and disallowed the same. By letter dated 21st August 1930 the respondent gave the appellant written notice of his said decision on the objection. (21) The appellant, being dissatisfied with the decision of the respondent, on 17th September 1930 in writing requested the respondent to treat his objection as an appeal and forward it to the Supreme Court of Victoria. (22) To correct the arithmetical error referred to in par. 16 of these admissions, the respondent caused an alteration to be made in the assessment of the taxable income of the said William Austin derived in the year ended 30th June 1929 which made the said taxable income amount to £2,681 instead of £2,651; and by notice of amended assessment dated 8th October 1930 gave notice of such alteration to the appellant. (23) The rate of tax for the said financial year was determined by the respondent as set forth in the accompanying sheets. (24) By letter dated 9th April 1929 the said William Austin by his duly authorized agent advised the Deputy Federal Commissioner of Taxation of his annual assessable income as at that date. (25) The refund of the sum of £992, being part of the sum of £1,628 paid for State income tax as set forth in par. 9 of these admissions, was the only refund of State income tax made to the said William Austin during the years 1922 to 1929 inclusive. (26) On 7th May 1931 the respondent forwarded the said objection to the Supreme Court of Victoria.

The case came on for hearing before *Lowe J.* who held that the taxpayer should be assessed for the financial year 1929-1930 as if William Austin deceased had never been a taxpayer before 30th



June 1926 and that the assessment should be reduced accordingly: *H. C. OF A.*  
*Austin v. Federal Commissioner of Taxation* (1). *1932.*

From this decision the Federal Commissioner of Taxation now  
 appealed to the High Court.

*Russell Martin*, for the appellant.

*Herring*, for the respondent.

*Cur. adv. vult.*

The following written judgments were delivered:—

*Nov. 21.*

GAVAN DUFFY C.J. AND DIXON J. An assessment as under  
 sec. 62 of the *Income Tax Assessment Act* 1922-1929 was made upon  
 the respondent, who is executor of a deceased taxpayer. The  
 taxpayer died on 10th July 1929, and the assessment is for the  
 financial year ending 30th June 1930 based upon income derived by  
 the taxpayer during the year ending 30th June 1929. In calculating  
 the rate of tax to be applied to the taxable income so derived by the  
 taxpayer, the Commissioner took the average income derived by  
 the taxpayer during the five years beginning 1st July 1924 and  
 ending 30th June 1929. The respondent appealed from this assess-  
 ment, alleging that the taxpayer had retired from his occupation in  
 February 1926 and that his income had in consequence been  
 permanently reduced to an amount less than two-thirds of his  
 average taxable income. Sub-sec. 9 of sec. 13 provides:—"Where  
 a taxpayer establishes that, owing to his retirement from his occupa-  
 tion, or from any other cause, his taxable income has been  
 permanently reduced to an amount which is less than two-thirds  
 of his average taxable income, he shall be assessed, and the provisions  
 of this section shall thereafter apply, as if he had never been a  
 taxpayer in a previous year. For the purposes of this sub-section,  
 'average taxable income' means the average taxable income by  
 reference to which the taxpayer's rate of tax would be calculated  
 apart from the provisions of this sub-section, if there were excluded  
 from his assessable income of the average years any income received  
 by him from sources from which he does not usually receive income."

Until February 1926 the taxpayer had derived much of his income  
 from carrying on the occupation of a pastoralist; but, when in that



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month he retired from that occupation, he invested his capital in interest-bearing securities from which he obtained a reduced income. It happened that during the next year of income, that ending 30th June 1927, although he received an assessable income of £1,957, he was required to pay for State income tax a sum of £1,628. This and some other deductions, including the statutory deduction of £300 allowable under sec. 24, reduced his taxable income to nothing and left an excess of allowable deductions over the assessable income amounting to £15 odd. In the following year, however, of the sum of £1,628 so levied, an amount of £992 was repaid to him by the State Taxation Commissioner. Under the proviso to sec. 23 (1) (b) this sum was included in his assessable income derived during the year ending 30th June 1928. Its inclusion brought the taxpayer's taxable income to £4,037. If the repayment of £992 had not been included, the taxable income would have been £3,045, but no sum appears to have been deducted for current State income tax. Possibly none was actually levied during that year : possibly it was levied and retained out of the refund to which the taxpayer would have been otherwise entitled in respect of the exaction of the preceding year. In the latter case, the true refund would be greater than £992, and the taxable income excluding the refund would be less than £3,045. Assuming that no State tax was levied upon the taxpayer within the year ending 30th June 1928, and excluding the repayment of £992 as "income received by him from sources from which he does not usually receive income," the following are the amounts of (1) the taxable incomes derived by the taxpayer during the years beginning 1st July 1921 and ending 30th June 1929, (2) the averages which appear material, and (3) the two-thirds of such respective averages :—

| Year of Derivation<br>Ending |    |    |    | Taxable<br>Income. | Average of<br>Preceding<br>5 years. | Two-thirds<br>of such<br>Average. |
|------------------------------|----|----|----|--------------------|-------------------------------------|-----------------------------------|
| 30th June 1922               | .. | .. | .. | £3,062             |                                     |                                   |
| " 1923                       | .. | .. | .. | £3,420             |                                     |                                   |
| " 1924                       | .. | .. | .. | £4,513             |                                     |                                   |
| " 1925                       | .. | .. | .. | £6,144             |                                     |                                   |
| " 1926                       | .. | .. | .. | £7,221             | £4,872                              | £3,248                            |
| " 1927                       | .. | .. | .. | —£15               | £4,257                              | £2,838                            |
| " 1928                       | .. | .. | .. | £3,045             | £4,182                              | £2,788                            |
| " 1929                       | .. | .. | .. | £2,681             | £3,815                              | £2,543                            |



If the refund of £992 is included in the taxable income derived in the year ending 30th June 1928 the last two rows of figures would be :—

|                |    |    |    |        |        |        |
|----------------|----|----|----|--------|--------|--------|
| 30th June 1928 | .. | .. | .. | £4,037 | £4,380 | £2,920 |
| „ 1929         | .. | .. | .. | £2,681 | £4,014 | £2,676 |

If it were right to ignore both the deduction of £992 in the year ending 30th June 1927 and its inclusion in the assessable income of the following year, the taxable income of the former year would be £1,277 and the last row of figures would be :—

|                |    |    |    |        |        |        |
|----------------|----|----|----|--------|--------|--------|
| 30th June 1929 | .. | .. | .. | £2,681 | £4,073 | £2,715 |
|----------------|----|----|----|--------|--------|--------|

But although under sub-sec. 9 unusual receipts may be excluded in calculating the average taxable income, there is nothing to authorize a similar treatment of unusual deductions. The taxpayer cannot therefore rely upon this last calculation. Thus upon these figures it appears that the taxable income derived in the year ending 30th June 1929, which is under assessment, exceeded two-thirds of the average taxable income of the five years ending 30th June 1929. If, therefore, the proper construction of sub-sec. 9 of sec. 13 requires a comparison between the income derived in the year under assessment and two-thirds of the average taxable income of the average years which terminate at the end of that year, it follows that the taxpayer could not establish that his taxable income was permanently reduced within the meaning of that sub-section. On the other hand, if the provision means that the income derived in the year under assessment is to be compared with two-thirds of the average taxable income of the average years ending with the commencement of that year, in this case of the five years ending 30th June 1928, the taxable income under assessment is less than two-thirds of that average, and, if the reduction of taxable income is attributable to the retirement, as no doubt it was, and was “permanent,” the taxpayer ought to have been assessed to tax as if he never had been a taxpayer in a previous year.

In our opinion sub-sec. 9 does not mean that a comparison shall be instituted between the taxable income under assessment and two-thirds of the average taxable income of the average years ending with the commencement of the year in which the income under assessment was derived. The comparison required is between

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the taxable income of a given year and two-thirds of the average taxable income of the average years ending with the termination of that year. Whether the given year must always be the year under assessment is a separate question. But the language of sub-sec. 9 does not admit of an interpretation by which a line is drawn at the commencement of the given year and the amount of two-thirds of the taxable income of the average years ending at that time is compared with the amount of the taxable income of the year beginning at that time. The expression "two-thirds of his average taxable income" is interpreted by the second paragraph of the sub-section, which provides that "average taxable income" means the average taxable income by reference to which the taxpayer's rate of tax would be calculated apart from the provision of the sub-section. The years upon which the rate of tax is calculated for assessment upon the income of any given year are the years beginning with the first average year and ending with the year next preceding the financial year for which the tax is payable (sub-sec. 2). "Ending with" means ending at the termination of the year. Further, in the latter part of the second paragraph of sub-sec. 9, the expression "average years" is used in requiring that unusual receipts of income shall be excluded. Sub-sec. 2 expressly says that in sec. 13 the years beginning with the first average year and ending with the year next preceding the financial year for which tax is payable are called "average years." Sub-sec. 9 was recast in its present form by sec. 4 of the *Income Tax Assessment Act* 1928. But these expressions are not accidental. For the sub-section in its previous form was expressed as follows: "Where a taxpayer establishes that, owing to his retirement from his occupation, or from any other cause, his taxable income has been permanently reduced to an amount which is less than two-thirds of the average taxable income by reference to which his rate of tax would be calculated, apart from the provisions of this sub-section, he shall be assessed as if he had never been a taxpayer in a previous year."

No doubt a comparison between the taxable income of the given year and the average taxable income derived in previous years would be more in keeping with the general policy which the section may be supposed to pursue; and, no doubt, the inclusion of the



year under assessment in the years upon which two-thirds of the average taxable income is calculated results in a denial of the benefit of the sub-section in cases in which taxpayers, owing to retirement from occupations, have clearly suffered greater reductions than one-third of their incomes. But these considerations are insufficient to overcome what appears to us the plain meaning of the language in which sub-sec. 9 is expressed. Although, as we have said, it may perhaps be a separate question whether any but the year of income under assessment can constitute the given year, the year during which the taxable income that is to be compared with two-thirds of the average taxable income is derived, nevertheless, the considerations already referred to almost involve the consequence that, except in so far as a contrary result is produced by the operation of the words "and the provisions of this section shall thereafter apply," the given year must be the year under assessment. The words in the second paragraph of sub-sec. 9 "average taxable income by reference to which the taxpayer's rate of tax would be calculated" show that the provision is dealing with the calculation of tax payable upon the income of the given year. In the first paragraph the words "where a taxpayer establishes that . . . his taxable income has been permanently reduced . . . he shall be assessed, . . . as if" &c., require the same conclusion. Moreover, sec. 13 is directed to describing in respect of time and locality the income to be taxed and to prescribing the method of calculating the rate of tax thereon. Apart, therefore, from the words dealing with the subsequent application of the sub-section, its provisions would be understood to relate to the ascertainment of tax on the income of the year under assessment. If the words "the provisions of this section shall thereafter apply" do not govern the present case, then, upon the figures already given, this interpretation would operate thus: the reduction to the sum of £2,681 of the taxable income which took place in the year under assessment is not below two-thirds of the average taxable income which is £2,543 or at most £2,676. It cannot be compared with the figure £3,248 for the average years ending 30th June 1926, or the figure £2,838 for the average years ending 30th June 1927, or the figure £2,788

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H. C. OF A. 1932. for the average years ending 30th June 1928, because these comparisons are irrelevant.

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But the important question remains whether the reduction reflected in the taxable income derived in the year ending 30th June 1927 may be relied upon as bringing the sub-section in operation as from that year so that the case is governed by the words "shall thereafter apply." By that time the taxpayer had retired from his occupation and his taxable income from that year was reduced below two-thirds of the average taxable income, viz., below £2,838. Because the taxpayer derived no taxable income during that year, no assessment was made upon him. It does not appear what information he laid before the Commissioner as to the cause of the reduction of his income, or as to its permanence. But supposing that he had done enough then to establish that, "owing to his retirement from his occupation, . . . his taxable income had been permanently reduced" below the amount of £2,838, the question would arise whether, although because he had no taxable income he was not and could not be assessed as if he had never been a taxpayer in a previous year, yet in subsequent years he would come under the operation of the words "and the provisions of this section shall thereafter apply, as if he had never been a taxpayer." The language of the sub-section is not adapted to a case where the reduction is at first so serious as to leave no taxable income. But such a case is clearly within its meaning. The word "thereafter" may mean after the assessment directed, but grammatically it more naturally relates to the suppositional clause beginning with the word "where" and refers to the reduction of the taxable income or to the establishing that it is reduced. The better interpretation of the sub-section is that it applies to such a case as that supposed, and, if in the year in which the taxable income reflects the reduction, there is no taxable income, and, if in reference to the ensuing financial year the cause and permanence are established, then in succeeding years the taxpayer must be assessed as if before that year he had never been a taxpayer. But as it does not appear that the taxpayer, by or in connection with his return of income derived in the year ending 30th June 1927, "established" the cause or the permanence, a further question arises, viz., is it open to him



now to "establish" the cause and the permanence of the reduction of his taxable income in that year? Can the taxpayer for the purpose of obtaining the benefit of the words "and the provisions of this section shall thereafter apply" prove in connection with his assessment in respect of income of the subsequent year that in the prior year his income was, owing to his retirement, permanently reduced to the necessary degree? Construing the word "thereafter" as applying, not to the assessment, but to an event described by the conditional clause, it becomes necessary to consider whether it refers to the time at which the fact of reduction and its permanence and cause are established, or to the time when the reduction itself occurs. The reference appears rather to be to the time of reduction. The provision should, therefore, be understood to mean that, if a taxpayer shows that owing to his retirement his taxable income, derived during a year in respect of which his liability to taxation under the provisions of sec. 13 should be, or should have been, determined, has been reduced to an amount less than two-thirds of his average taxable income of the average years ending with that year, and that the reduction had the required quality of "permanence," then, after that reduction in that taxable income, he shall be assessed as if he had never been a taxpayer in a year previous to the year in which that reduced income was derived. Notwithstanding that since the reduction the taxpayer has allowed a year or more to pass without establishing his right to be assessed as if he had never been a taxpayer before the year of reduction, yet, when the rate of tax is calculated for a subsequent year, he is entitled to insist that the calculation shall be made upon that footing, viz., that prior to the year of reduction he had never been a taxpayer.

There remains the question of fact whether the respondent has established that the reduction of income derived during the year ending 30th June 1927 owing to the taxpayer's retirement was a "permanent" reduction below £2,838. The difficulty lies in the fact that, excluding the refund of tax, the taxable income of the year ending 30th June 1928 was £3,045. The exclusion of the refund of tax for the purpose of considering permanence seems proper. The word "permanent" is employed in an inexact but

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a very usual sense of indefinitely continuing. To concede that a taxable income has been swelled by a refund in one year of an over-payment chargeable to the income of a preceding year is not inconsistent with the proposition that it was permanently reduced below the figure which by that accident the income of one year afterwards reached. But the figure of £3,045 creates a greater difficulty in the taxpayer's way. It appears from the evidence that the taxpayer had invested his money at good rates of interest, but that his assessable income might be expected not to exceed £3,225. His annual State taxation upon this income, it is said, would not have been less than £350 which would reduce his taxable income at least to £2,875. The State tax upon an assessable income of £3,225 derived in the year ended 30th June 1928 appears to be £381. What other deductions he could claim or might be expected to incur do not clearly appear. But his assessable income for that year amounted actually only to £3,184 and for some reason no deduction for State tax appears to have been made or claimed. In the case of an annual recurring charge, such as State taxation, the accident that it was levied twice in one year and not at all in another year cannot detract from the permanence of the reduction of income which bears it. But it seems probable that the taxable income upon which the State tax for the then current year was payable was between £1,250 and £1,300, and this tax would be much lower than usual. *Lowe J.*, however, found that a permanent reduction had taken place, but we are not sure below what figure. The evidence does not appear to have been directed to the question whether the reduction of income in the year ending 30th June 1927 was a permanent reduction below £2,838.

On the whole, we think, the best course to adopt is to remit the matter to *Lowe J.* and allow the question to be reconsidered by him.

The costs of this appeal should be made costs in the cause.

*RICH J.* By sub-sec. 2 of sec. 13 of the *Income Tax Assessment Act 1922-1929* provision is made for calculating the rate of tax to be applied in ordinary cases to the taxable income derived by a taxpayer during the year preceding the financial year in respect of



which he is assessed. It requires that the rate of tax shall be calculated by reference to the average taxable income of the average years beginning with the first average year and ending with the year next preceding the financial year for which the tax is payable. It is not denied that this requirement prescribes an average taken over a period which terminates at the end of the accounting period during which the income under taxation is derived. Sub-sec. 9 of the same section makes a special provision for taxpayers who have suffered a diminution of income through retirement from an occupation or other cause. If a taxpayer establishes that he has so suffered a permanent reduction of his taxable income "to an amount which is less than two-thirds of his average taxable income, he shall be assessed, and the provisions of this section shall thereafter apply, as if he had never been a taxpayer in a previous year." If in the present case the amount of two-thirds of the taxpayer's average taxable income is ascertained for the purposes of this section in the same way as it is ascertained for the purposes of sub-sec. 2 there is much difficulty in discovering in the findings made in the Court below a permanent reduction below that amount. Mr. *Herring* for the respondent, however, contends that for the purposes of sub-sec. 9, which institutes a comparison between the amount of one year and two-thirds of the average of the amounts of the taxable income of a number of years, the same period should not be adopted under sub-sec. 9 as under sub-sec. 2. The foundation of his argument lies in the suggestion that when a reduced income is to be compared with an average income it is not reasonable to include the reduced income itself in the figures which are to be averaged. Whatever inherent rationality may be perceived in this argument in the abstract, it is confronted not only by the general conception of the averaging provisions but by the very words of sub-sec. 9 itself. The general conception upon which the averaging provisions of sec. 13 proceed is that the average shall be taken up to the close of the accounting period under taxation. There is nothing improbable in the supposition that, in dealing with a sudden diminution of income, the Legislature should compare the average by which the taxpayer would be governed in default of express

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provision with his actual taxable income so diminished. It may be true as Mr. *Herring* pointed out that the mathematical consequences of this comparison may leave a taxpayer without relief under the section, although his reduction has been so great that he merits some dispensation from the rigours of sub-sec. 2. But mathematical implications are not always apparent to those who express general ideas even in an Act of Parliament. In the present case the language of the Legislature seems to be explicit and unambiguous. Sub-sec. 9 provides : " For the purposes of this sub-section, ' average taxable income ' means the average taxable income by reference to which the taxpayer's rate of tax would be calculated apart from the provisions of this sub-section, if there were excluded from his assessable income of the average years any income received by him from sources from which he does not usually receive income." There can be no doubt over what period the calculation must proceed of " the average taxable income by reference to which the taxpayer's rate of tax would be calculated apart from the provisions of this sub-section." The period is that prescribed by sub-sec. 2 ending with the termination of the accounting period under taxation. Mr. *Herring* suggested that the real office of this definition was to provide for the exclusion from the figures averaged of unusual receipts and that the words which I have emphasized were not used with any particular significance. I should be sorry to disparage Mr. *Herring's* able argument, but this particular contention may not unfairly be described as seeking refuge in the maxim *falsa demonstratio non nocet cum de corpore constat*, which can rarely be applied with success to the definitions of the Legislature. The difficulty is that there is no subject which is clear, unless it be the very period which the argument denies. But, in any case, unfortunately for the argument, the condition of the sub-section before it was amended by the *Income Tax Assessment Act* 1928 makes it quite clear that the description of the average taxable income was intentional because the phrase then did not relate in any way to unusual receipts and was concerned only with describing the average taxable income. It follows that for the purposes of comparing reduced income with the average taxable income the average must be taken as under



sub-sec. 2, i.e., up to the end of the accounting period under consideration. In the circumstances of this case this interpretation means that the taxpayer can only succeed if he can show that a reduction took place during the year ending 30th June 1927 which was "permanent" within the meaning of that expression in sub-sec. 9, and arose from his retirement from his occupation, so that his is a case governed by the words "and the provisions of this section shall thereafter apply, as if he had never been a taxpayer in a previous year," i.e., previous to the financial year then commencing. This means that he must show that the reduction which he experienced in that year as the undeniable result of his retirement was permanently below £2,838. I doubt whether the parties at the hearing before *Lowe J.* had this figure in mind when the admissions between them were settled. Upon the figures which appear, the taxable income of the taxpayer in the very next year excluding a refund of taxation and deducting a conjectural amount of State tax seems to have amounted to a few pounds more than £2,838. This does not make it impossible for the taxpayer to establish the permanence of the reduction below £2,838 in the previous year, but the materials before us do not enable us satisfactorily to determine it. The better course appears to be to allow the matter to be reconsidered by *Lowe J.*

STARKE J. This is an appeal by the Commissioner of Taxation from a decision of *Lowe J.* in the Supreme Court of Victoria, directing that Austin William Austin the executor and trustee of William Austin deceased be assessed for the financial year 1929-1930 as if the said William Austin had never been a taxpayer before 30th June 1926.

The *Income Tax Assessment Act* 1922-1929, sec. 13 (9), provides:—"Where a taxpayer establishes that, owing to his retirement from his occupation, or from any other cause, his taxable income has been permanently reduced to an amount which is less than two-thirds of his average taxable income, he shall be assessed, and the provisions of this section shall thereafter apply, as if he had never been a taxpayer in a previous year. For the purposes

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of this sub-section 'average taxable income' means the average taxable income by reference to which the taxpayer's rate of tax would be calculated apart from the provisions of this sub-section, if there were excluded from his assessable income of the average years any income received by him from sources from which he does not usually receive income." The rate of tax is calculated under the Act by which the rates of income tax are declared as if the taxable income were the average of the income derived by the taxpayer in the years beginning with the first average year and ending with the year next preceding the financial year for which the tax is payable. The first average year is the fifth year before the financial year for which the tax is payable.

William Austin retired from his business as a grazier in February 1926, and died in July 1929. The Commissioner assessed his executor to income tax for the financial year 1929-1930 upon a taxable income of £2,681 derived during the preceding twelve months. But the rate of tax was calculated as if the taxable income averaged during the years 1924-1929 the sum of £4,013. See sec. 13 (3). The calculation in detail was as follows:—

| Income Year. | Taxable Income. | Excess of Deductions<br>over Assessable Income. |
|--------------|-----------------|-------------------------------------------------|
| 1924-1925    | £6,144          |                                                 |
| 1925-1926    | 7,221           |                                                 |
| 1926-1927    | —               | £15                                             |
| 1927-1928    | 4,037           |                                                 |
| 1928-1929    | 2,681           |                                                 |
|              | £20,083         |                                                 |
|              | 15              |                                                 |
|              | £20,068         |                                                 |

Average over 5 years, £4,013.

Tax assessed on £2,681 property at rate of tax applicable to  
£4,013, viz., 30-5605 pence : £441 18s. 6d.

The Commissioner thus denied the taxpayer the benefit of sec. 13 (9) of the Act. That sub-section requires a comparison between the taxable income of the taxpayer for a given financial year and his average taxable income. And it is said that the comparison should be between the income subject to tax in the financial year and the average income of a period that preceded it. The method



of the Commissioner depresses the average income, and thus operates in many cases, as here, to exclude the taxpayer from the benefit of sec. 13 (9). Now the Act provides that "average taxable income" in sec. 13 (9) means the average taxable income by reference to which the taxpayer's rate of tax would be calculated apart from the provisions of the sub-section if there were excluded from his assessable income of the average years any income received by him from sources from which he does not usually receive the same. *Lowe J.* was of opinion that this paragraph did not fix the period in respect of which the average taxable income should be calculated, but was concerned only with the method of calculation when the period was determined.

On the whole, I agree with this view. The contrary view reads sub-sec. 9 as if it said average taxable income means taxable income by reference to which the taxpayer's rate of tax would be calculated *upon the reduced taxable income* for the financial year in respect of which tax is payable, apart from the provisions of this sub-section. It can equally well be read that average taxable income means the average taxable income by reference to which the taxpayer's rate of tax would be calculated *upon the taxable income before reduction* apart from the provisions of the sub-section. The latter reading is much more in accordance with realities and therefore to be preferred. The final provision in the paragraph, directing the exclusion from the taxpayer's assessable income of the average years any income received by him from sources from which he does not usually receive income, is applicable to either reading, and therefore throws no light upon the proper construction of the section. Once the period in respect of which the average taxable income should be calculated is determined, the method is that prescribed by sec. 13, sub-secs. 2 and 3. Some reference was made to an earlier enactment, that contained in sec. 13 (9) of the *Income Tax Assessment Act* of 1922, but the same problem arises, as it seems to me, under that section as under the sub-section now under consideration.

A further question calls for consideration. Where a taxpayer establishes that owing to his retirement from his occupation his taxable income has been permanently reduced, he shall be assessed

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and the provisions of the section shall thereafter apply as if he had never been a taxpayer in a previous year. The fact of reduction must be established in some financial year for which tax is payable, and thereafter the taxpayer shall be assessed as if he had never been a taxpayer in a year previous to that in which he establishes the fact that his income was permanently reduced. *Lowe J.* was satisfied that the taxpayer's income in the present case was permanently reduced, and that the reduction occurred in the period of twelve months preceding the financial year 1927-1928. But the taxpayer only established the fact of that reduction in relation to his taxable income in the financial year 1929-1930, for which his income, based upon that derived in the preceding twelve months, was £2,681. This taxable income of £2,681 must be compared with his average taxable income in the five years that preceded that financial year. The figures are :—

| Financial Year.             | Taxable Income. |
|-----------------------------|-----------------|
| 1924-1925                   | £4,513          |
| 1925-1926                   | 6,144           |
| 1926-1927                   | 7,221           |
| 1927-1928                   | — 15            |
| 1928-1929                   | 4,037           |
| Average .. ..               | £4,380          |
| Two-thirds of Average .. .. | £2,920          |
| Taxable Income .. ..        | £2,681          |

It thus appears that the taxpayer's taxable income in the financial year 1929-1930 was reduced to an amount less than two-thirds of his average taxable income, and, as before stated, *Lowe J.* found that the reduction was permanent. I have taken the figure £4,037 for the year 1928-1929, but if there were excluded a refund of taxation of £992, which was not a usual source of income (sec. 13 (9) ), the average income would be £4,182, and two-thirds of that is £2,788. But the result to the taxpayer is not altered.

The order of *Lowe J.* allowing the appeal should, in my opinion, be affirmed, but I would slightly vary his order, and declare that the appellant as executor be assessed for the financial year 1929-1930 as if he had never been a taxpayer in any previous year. That is the year in which he established the fact of the permanent reduction of his income, and a " new start " is given to the period called the " average year."