[HIGH COURT OF AUSTRALIA.]

McCAULEY . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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BRISBANE, *June* 13.

SYDNEY, *July* 28.

Latham C.J., Rich and McTiernan JJ.

Income Tax (Cth.)—Assessable income—Royalty—Agreement to sell standing timber at a price or royalty—Income Tax Assessment Act 1936-1941 (*No.* 27 *of* 1936—*No.* 69 *of* 1941), *s.* 26 (*f*).

By an agreement in writing the owner of certain lands agreed as vendor to sell to a purchaser the right to cut and remove the standing milling timber "at or for a price or royalty of three shillings (3s.) for each and every one hundred (100) superficial feet of such milling timber so cut."

Held, by *Latham* C.J. and *McTiernan* J. (*Rich* J. dissenting), that the money received by the owner for timber cut and removed from the land was an amount received "as or by way of royalty" within the meaning of s. 26 (*f*) of the *Income Tax Assessment Act* 1936-1941, and as such should be included in his assessable income.

APPEAL.

John Thomas McCauley appealed to the High Court from a decision of the Board of Review upholding an assessment to income tax on his income for the year ended 30th June 1941. Pursuant to s. 18 of the *Judiciary Act* 1903-1940 it was ordered that the appeal be argued before the Full Court.

McCauley was a dairy farmer who owned certain land on which there was growing timber. He did not acquire the land for the purpose of growing or selling timber. On 15th February 1940 he entered into a written agreement whereby he as vendor agreed to sell to one Laver as purchaser and the purchaser agreed to purchase the right to cut and remove the standing milling timber then growing on the land "at or for the price or royalty of three shillings (3s.)

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for each and every one hundred (100) superficial feet of such milling timber so cut." The purchaser agreed to cut and remove all the milling timber within a period of twelve months from 29th February 1940. It was also agreed that the price or royalty based on timber cut and removed in each month should be paid before the end of the following month.

The Federal Commissioner of Taxation included in McCauley's assessable income for the year ended 30th June 1941 the amount received in respect of the right granted to cut and remove timber as being an amount received as or by way of royalty within the meaning of s. 26 (*f*) of the *Income Tax Assessment Act* 1936-1941. The assessment was upheld by the Board of Review.

McCauley appealed to the High Court from the decision of the Board of Review.

Further facts, other terms of the agreement between McCauley and Laver, and the relevant statutory provisions appear in the judgments hereunder.

Bennett, for the appellant. The moneys received by the vendor were in the nature of payments for a capital asset (*Resch* v. *Federal Commissioner of Taxation* (1)). The word " royalty " as used in the *Income Tax Assessment Act* 1936-1941 means a payment for a user and not a payment on a purchase or sale. A royalty is in the nature of rent (*Attorney-General of Ontario* v. *Mercer* (2) ; *Black* v. *Federal Commissioner of Land Tax* (3)). This agreement has none of the characteristics of a lease. Because the parties used the word royalty, the payment does not necessarily become a royalty (*Minister of National Revenue* v. *Spooner* (4)). The agreement gives no right to distress and confers no more than a licence to enter and cut trees. [He also referred to *Californian Oil Products Ltd.* v. *Federal Commissioner of Taxation* (5) ; *Thomson* v. *Deputy Federal Commissioner of Taxation* (6) ; *Jones* v. *Leeming* (7) ; *Van den Berghs Ltd.* v. *Clark* (8) ; *Secretary of State in Council of India* v. *Scoble* (9) ; *Inland Revenue Commissioners* v. *British Salmson Aero Engines Ltd.* (10) ; *British Dyestuffs Corporation (Blackley) Ltd.* v. *Inland Revenue Commissioners* (11) ; *Sun Newspapers Ltd.* v. *Federal Commissioner of Taxation* (12) ; *Federal Commissioner of Taxation* v. *Henderson* (13) ; *Roberts* v. *Lord Belhaven's Executors* (14).]

(1) (1942) 66 C.L.R. 198.
(2) (1883) 8 App. Cas. 767.
(3) (1920) 27 C.L.R. 483, at p. 488.
(4) (1933) A.C. 684, at p. 688.
(5) (1934) 52 C.L.R. 28.
(6) (1929) 43 C.L.R. 360.
(7) (1930) A.C. 415.
(8) (1935) A.C. 431.
(9) (1903) A.C. 299.
(10) (1938) 2 K.B. 482.
(11) (1924) 12 Tax Cas. 586.
(12) (1938) 61 C.L.R. 337.
(13) (1943) 68 C.L.R. 29.
(14) (1925) 9 Tax Cas. 501.

Lukin, for the respondent. The words of s. 26 (*f*) are " any amount received as or by way of royalty." Section 69 deals with timber acquired for sale, and does not apply to s. 26 (*f*). If the money is received as or by way of royalty it is taxable income whether the royalty is in the nature of capital or income (*Resch* v. *Federal Commissioner of Taxation* (1); *British Salmson Aero Engines Ltd.* v. *Inland Revenue Commissioners* (2)). The words used by the legislature must be given their literal and popular meaning (*Australasian Temperance and General Mutual Life Assurance Society Ltd.* v. *Howe* (3)). In this agreement the word " royalty " is used in a business or commercial sense. The word is commonly used in contracts where payment is measured by some reference to the quantity of goods sold (*Shingler* v. *P. Williams and Sons* (4); *Akers* v. *Commissioner of Taxes* (*N.Z.*) (5); *Kauri Timber Co.* (*Ltd.*) v. *Commissioner of Taxes* (6)). This is not a contract for the sale of an interest in land (*Marshall* v. *Green* (7)). In *Thomson* v. *Deputy Federal Commissioner of Taxation* (8) there was a sale for a lump sum, and no question of royalty arose. In *Minister of National Revenue* v. *Spooner* (9) the payment was part of the purchase price. Here the payments depend on the amount of timber cut. They are received as or by way of royalty, and therefore form part of the taxable income.

Bennett, in reply. The words " as or by way of " do not alter the meaning of the word royalty. The money must be received in fact as a royalty. The question does not depend on the language which the parties used to describe the payment (*Minister of National Revenue* v. *Spooner* (9); *Gage* v. *Brealey* (10); *Inland Revenue Commissioners* v. *Longmans Green & Co. Ltd.* (11); *Macklow Bros.* v. *Frear* (12); *Gunn's Commonwealth Income Tax Law and Practice*, (1943), at pp. 266, 268).

Cur. adv. vult.

July 28.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal under the Commonwealth *Income Tax Assessment Act* 1936-1941, s. 196, from a decision of a Board of Review, referred to the Full Court for argument under the *Judiciary Act* 1903-1940, s. 18, the parties agreeing that the evidence

(1) (1942) 66 C.L.R. 198.
(2) (1938) 22 Tax Cas. 29.
(3) (1922) 31 C.L.R. 290, at p. 294.
(4) (1933) 17 Tax Cas. 574.
(5) (1926) G.L.R. (N.Z.) 259.
(6) (1912) 31 N.Z.L.R. 617.
(7) (1875) 1 C.P.D. 35.
(8) (1929) 43 C.L.R. 360.
(9) (1933) A.C. 684.
(10) (1898) 67 L.J. Q.B. 457.
(11) (1932) 17 Tax Cas. 272.
(12) (1913) 33 N.Z.L.R. 264.

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taken before the Board of Review be accepted as the evidence in the appeal. An appeal lies to the High Court from any decision of the Board which involves a question of law (s. 196 (1)). The question of law which is involved relates to the interpretation and application to the facts of the provision contained in s. 26 of the Act that: "The assessable income of a taxpayer shall include . . . (*f*) any amount received as or by way of royalty." The question for our decision may be expressed in the following form: "Is their evidence before the Court upon which it may properly be held that certain payments made to the taxpayer were received as or by way of royalty?" The answer to this question involves the interpretation of the word "royalty" when it appears in the statute.

There is no dispute as to the facts. The taxpayer, John Thomas McCauley, was a dairy farmer and owned certain land upon which there were growing trees. He did not acquire the land for the purpose of growing timber thereon or selling it therefrom. On 15th February 1940 he made a written agreement with one Thomas Laver, in which he was described as the vendor and Laver as the purchaser. The vendor agreed to sell and the purchaser agreed to purchase the right to cut and remove the standing milling timber then growing on specified land "at or for a price or royalty of three shillings (3s.) for each and every one hundred (100) superficial feet of such milling timber so cut." The purchaser agreed to cut and remove all the milling timber from the property within a period of twelve months and to pay the price or royalty under the contract monthly. The agreement contained provisions for monthly statements of timber removed and for what may be described as a minimum of interference with the use of the property as a grazing property.

The vendor still retained possession of the property and the agreement cannot be described as a lease. It was an agreement for the sale of growing timber to be taken away by the purchaser, and was therefore an agreement for the sale of goods (*Marshall* v. *Green* (1)).

The Board of Review held that the moneys paid under the agreement, amounting to a net sum of £1,439, were royalties and were taxable under s. 26 (*f*) of the Act.

The appellant relied principally upon two cases: *Thomson* v. *Deputy Federal Commissioner of Taxation* (2), and *Minister of National Revenue* v. *Spooner* (3).

(1) (1875) 1 C.P.D. 35.
(2) (1929) 43 C.L.R. 360.
(3) (1933) A.C. 684.

In *Thomson's Case* (1) the facts were that the taxpayer agreed to sell growing timber for a lump sum of £1,800. It was found as a fact that the land was not taken up with a view to growing or selling timber, and that there was therefore "no question in the case of a business, trade, pursuit or avocation." The Commissioner sought to tax the sum in question as income from property. It was obviously not income from property in the nature of rent, and it was held that it represented simply the proceeds of the sale of part of an asset, and that the sum was therefore not taxable.

In the present case it is not contended for the Commissioner that the taxpayer was carrying on a business of selling timber and the facts show that no such contention could be supported. Further, the terms of the agreement show that the moneys received were not rent. There was plainly no lease of the property to the purchaser of the timber. In *Thomson's Case* (1) a lump sum payment was made for all the timber of a certain size on the land. It was not suggested in *Thomson's Case* (1) that the lump sum paid for the timber was a royalty. Thus the decision in that case does not assist in the determination of the question which arises in the present case. The contention for the Commissioner here is that, it being admitted that the moneys received were not the proceeds of any business carried on by the taxpayer and that they represent the price of goods which were capital assets, nevertheless, as that price was paid in the form of royalties, the moneys are part of the taxpayer's assessable income.

In *Minister of National Revenue* v. *Spooner* (2) the question arose as to the taxability of the value of certain oil received by a landowner under an agreement whereby she sold freehold land to a company for a consideration consisting of a sum in cash, shares in the company, and delivery of ten per cent (described as a royalty) of the oil produced from the land, on which the company agreed to carry out drilling and, if oil was found, pumping operations. It was held that the royalties were in effect payment by instalments of part of the price of property which had been sold and that they could not be regarded as income.

Thomson's Case (1) decides that a profit on the sale of a capital asset cannot be taxed as proceeds of a business carried on by a person. *Minister of National Revenue* v. *Spooner* (2) applies the same principle, holding that the price of property was to be distinguished from a profit derived from property by way of income.

The Commonwealth *Income Tax Assessment Act*, however, does tax, and validly taxes, certain receipts which are of a capital nature

(1) (1929) 43 C.L.R. 360. (2) (1933) A.C. 684.

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(*Resch* v. *Federal Commissioner of Taxation* (1)). Thus, even if it be conceded that the timber sold in this case was a capital asset, that fact does not necessarily mean that the proceeds of the sale are not taxable. The question for decision is whether the proceeds of the sale of the timber, though representing the price of a capital asset, were an " amount received as or by way of royalty."

The word " royalty " in s. 26 is plainly not used in the sense of *jura regalia*. The Act refers to royalties received by subjects, and not to the regal rights of the Crown.

The word " royalty " is most commonly used in connection with agreements for the use of patents or copyrights and in relation to minerals. In the case of patents a royalty is usually a fixed sum paid in respect of each article manufactured under a licence to manufacture a patented article. Similarly the publisher of a work may agree to pay the author royalties in respect of each copy of the work sold. See *Encyclopaedia of the Laws of England*, 2nd ed., vol. 11, pp. 327, 328, sub. " royalty " ; *Stroud, Judicial Dictionary*, 2nd ed. (1903), vol. 2, p. 1772, " royalties " in its " secondary senses." In the case of mineral leases, a rent is reserved by the lease and frequently royalties are also made payable, being sums calculated in relation to " the quantity of minerals gotten " (*Attorney-General of Ontario* v. *Mercer* (2))—in such a case the royalties represent " that part of the reddendum which is variable." As to the various forms of mining royalties, see *Halsbury's Laws of England*, 2nd ed., vol. 22, pp. 602 and 603. Royalty is defined in *Wharton's Law Lexicon*, 14th ed. (1938), as follows : " Royalty, payment to a patentee by agreement on every article made according to his patent ; or to an author by a publisher on every copy of his book sold ; or to the owner of minerals for the right of working the same on every ton or other weight raised." In the case of mining royalties, the person who pays the royalty acquires the property in the minerals which he gets.

Use of the term " royalty " is not, however, limited to patents, copyrights and minerals. The term has been used to describe payments for removing furnace slag from land (*Shingler* v. *P. Williams & Sons* (3)), and to payments for flax cut (*Akers* v. *Commissioner of Taxes* (*N.Z.*) (4)), the person paying the royalties becoming the owner of the slag or of the flax. In *Kauri Timber Co. Ltd.* v. *Commissioner of Taxes* (*N.Z.*) (5), there is a reference to timber royalties

(1) (1942) 66 C.L.R. 198.
(2) (1883) 8 App. Cas. 767, at p. 777.
(3) (1933) 17 Tax Cas. 574.
(4) (1926) G.L.R. (N.Z.) 259.
(5) (1913) A.C. 771.

calculated, as in the present case, per 100 feet cut: See the report (1). The New Zealand statute which was under consideration in that case provided for the taxation as "income derived from business" of profits derived from the extraction, removal, sale or treatment of minerals, timber or flax whether by way of rent, royalties or commercial profit. The statute illustrates the use of the word "royalty" in connection with the removal or sale of timber.

In Australia payments for the right to cut and take away timber are commonly described as royalties in the statutes of the States which relate to this matter: See *Forestry Act* 1916-1935 (N.S.W.), ss. 30, 41 (*c*); *Forests Act* 1928 (Vict.), ss. 5 (*c*), 58, and 59; *State Forests and National Parks Acts* 1906 *to* 1934 (Q.), s. 6 (1) (iii); *Forests Act* 1918-1931 (W.A.), s. 43 (25); *Forestry Act* 1920 (Tas.), s. 29—see also the *Forests Act* 1921-1922 (N.Z.), s. 30. The provisions in these statutes relate to payments made to the Crown or to some public authority, but the word "royalties" is obviously not used in its primary sense of *jura regalia*, which exist independently of any agreement or dealing between the Crown and its subjects. The royalties referred to in the statutes are simply payments under licences to cut and remove timber.

In my opinion the word "royalty" is properly used for the purpose of describing payments made by a person for the right to enter upon land for the purpose of cutting timber of which he becomes the owner, where those payments are made in relation to the quantity of timber cut or removed. Thus I am of opinion that the moneys received by McCauley were royalties and accordingly were part of his assessable income.

It may be added that the words of s. 26 (*f*) of the Act are "any amount received as or by way of royalty," and not merely "royalties." It may be argued for the Commissioner that, even if the sums in question in the present case were not in fact royalties, yet they were received "as or by way of royalty" by reason of the terms of the agreement referring to them expressly as royalties. In my opinion much is to be said for the contention that effect can be given to the precise words of this provision only by holding that if an amount is received as or by way of royalty it is included in assessable income, even though it may not be a royalty in fact. Otherwise the provision would be interpreted as if, instead of using the words "any amount received as or by way of royalty," the Act had simply provided that

(1) (1913) A.C., at p. 772.

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"royalties" should be included in assessable income. In the present case, however, the moneys received are described in the agreement as "price *or* royalty," and it has been argued for the taxpayer that it is therefore not clear that moneys received under the agreement were received as or by way of royalties and not as and by way of price. But in my opinion, for reasons which I have stated above, even if the amounts received were the price of the goods sold (as in my opinion they were) they are nevertheless also royalties and were received as royalties as well as prices, and are therefore properly included within the assessable income of the taxpayer.

The taxation of royalties as income has often been criticized, and authors in particular have complained of the hardship involved in imposing tax upon royalties received in one year which may represent the reward for the work of several years. It may be urged that timber royalties which represent merely the sale of an asset and not the proceeds of a business of timber growing should not be taxed as income—or, if taxed, should be distributed over a number of years instead of being taxed in relation to the year of receipt so as greatly to increase the rate of tax in that year. But these arguments have not convinced legislatures and, in Australia, moneys "received as or by way of royalty" are included within assessable income.

In my opinion the appeal must be dismissed.

RICH J. This appeal is concerned with a sum representing the proceeds of sale of the right to remove standing timber from land owned by the taxpayer. It was included in the assessment of his income for the year ended 30th June 1941 as being an amount received as or by way of royalty (*Income Tax Assessment Act* 1936-1941, s. 26 (*f*)). The taxpayer claimed the excision of the amount from his assessment, and upon the claim being disallowed by the Commissioner that decision was referred to the Board of Review, which in its turn rejected the claim. From this decision the taxpayer has appealed to this Court. The taxpayer has never acquired any land for the purpose of felling, or growing and felling, timber for sale, or for the purpose of selling the right to cut and remove timber. In 1920 the subject land on which he had previously agisted his dry stock was transferred to him. It was "thickly

covered with timber and undergrowth. The timber included hardwood which was interspersed all over the property with a lot of useless timber, brush and undergrowth." After he had "fired" the land he realized that the hardwood was worth something. He had the useless timber rung and the brush and undergrowth grubbed so as to give the millable timber a chance to mature. During the period 1920 to 1940 the taxpayer continued to agist his dry stock on the land. But when the war brought about a demand for millable timber he entered into an agreement with one Laver for the sale of the timber rights from the proceeds of which the sum in question is derived. This agreement provides for the sale of the right to cut and remove the standing milling timber then growing on the land "at or for the price or royalty of three shillings (3s.) for each and every one hundred (100) superficial feet of such milling timber so cut." The purchaser agreed to cut and remove from the land all milling timber within a period of twelve months from 29th February 1940. It was also agreed that the price or royalty based on timber cut and removed in each month should be paid before the end of the next following month. The Board found that the taxpayer did not acquire the land for the purpose of growing or selling timber or the right to cut and remove timber and that the sum in question consisted of receipts in the nature of capital.

The agreement in question is one of sale and purchase and not a lease. The price is fixed or ascertainable by measurement of the timber cut each month and constitutes the payment for the purchase of a capital asset. The method of payment is from the nature of things by instalments which are not gains, profits or receipts of an income character: Cf. *Lady Foley* v. *Fletcher* (1); *Egerton-Warburton* v. *Deputy Commissioner of Taxation* (2).

The amounts payable to the appellant are in the agreement described as "price or royalty," but this is not conclusive. The question is whether they are in law received by him as or by way of royalty. In its primary sense, royalty denotes one of the beneficial rights of the Crown, such as the right to *bona vacantia*, escheats, treasure trove, and so forth. In its secondary sense, and that is the sense in which it is used in s. 26 (*f*), it denotes a consideration paid for permission to exercise a beneficial privilege, usually made payable as and when the privilege is exercised, and measured by

(1) (1858) 3 H. & N. 769 [157 E.R. 678].

(2) (1934) 51 C.L.R. 568, at p. 572

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the quantum of the benefit from time to time received from the exercise, for example, by the quantity of minerals won by the exercise of mining rights, or the number of articles manufactured under a licence to use a patent or a secret process. The question whether, in a particular case, a payment amounts to a royalty depends upon its character, and this, in turn, depends upon the nature of the contract under which it is made.

A contract by which one person authorizes another to cut and remove timber from land of the former may be of one or other of two different types. It may amount to a sale, as chattels, of all or some specified part of the trees on the land for a price payable in a lump sum, or by instalments determined by the quantity of the timber sold which is removed from time to time. Or it may amount to the creation of a *profit à prendre*, an interest in the timber, treated as part of the realty, coupled with a right to remove it on payment of sums stipulated for as consideration for the rights created by the *profit*. The category into which any particular contract falls depends upon its terms. If its scheme is that the timber-getter acquires the right to all or some specified part of the existing timber, and is to cut and remove it immediately, or within so short a time that no benefit from the land in respect of increased growth of the trees could have been contemplated, the contract is one for the sale of the existing trees as chattels, for which the land serves only as a store-house until they are removed (*Marshall* v. *Green* (1)). On the other hand, if the contract creates a right to enter the land whenever the party is disposed to do so, and to cut and take therefrom such timber (or such timber of a specified class) as he may from time to time desire to obtain, on payment of a sum determined by the quantity taken, the contract is not one of sale but creates a *profit à prendre*: Cf. *In re Refund of Dues paid under s.* 47 (*f*) *of the Timber Regulations in Manitoba, British Columbia, Saskatchewan and Alberta* (2). In the former case, the amounts paid are instalments of a price; in the latter, they are royalties paid in respect of the enjoyment of a *profit à prendre*. The distinction is well brought out by *Lawrence* J. in *Stratford* (*Inspector of Taxes*) v. *Mole and Lea* (3).

In the present case, there was a sale by the appellant of the right to cut and remove all the standing milling timber then growing on

(1) (1875) 1 C.P.D. 35.

(2) (1935) A.C. 184, at pp. 192, 193.

(3) (1941) 165 L.T. 378.

the land, and an agreement by the purchaser to cut and remove it all within a period of twelve months. In these circumstances, on the facts found, I am of opinion that there was a sale by the appellant of a capital asset at a price, and that the facts that the price was made payable by instalments determined by the number of superficial feet from time to time cut, and that these instalments are described as " price or royalty," do not make them amounts received as or by way of royalty within the meaning of the section. The nature of a particular sum does not depend upon the language in which the parties have chosen to describe it (*Secretary of State in Council of India* v. *Scoble* (1) ; *Minister of National Revenue* v. *Spooner* (2)). And " it is always unsatisfactory and generally unsafe to seek the meaning of words used in an Act of Parliament in the definition clauses of other statutes dealing with matters more or less cognate, even when enacted by the same legislature. *A fortiori* must it be so when resort is had, as in the *Swinburne Case* (3), for this purpose to the enactments of other legislatures " (*Adamson* v. *Melbourne and Metropolitan Board of Works* (4)).

For these reasons, I am of opinion that the appeal should be allowed.

McTiernan J. The decision of the Board of Review from which this appeal is brought is that a sum of money received by the taxpayer, the present appellant, in respect of a right which he granted to cut and remove timber from his land, is assessable income. The ground of the decision is that such money was received by the taxpayer as or by way of royalty within the meaning of s. 26 (*f*) of the *Income Tax Assessment Act* 1936-1941.

The appeal is based on s. 196 (1) of the Act. The question of law involved in the decision of the Board is whether the Board rightly construed and applied s. 26 (*f*).

The word " royalty " is not defined in the Act. It is plain that in this context the word does not mean the rights belonging to the Crown *jure coronae* (*Attorney-General of Ontario* v. *Mercer* (5)). It seems to me that the word in the present context is used to signify payments made to a taxpayer to which business or commercial usage attaches the name of royalty. A common application of the

(1) (1903) A.C. 299, at pp. 302, 304.
(2) (1933) A.C. 684, at p. 688.
(3) (1920) 27 C.L.R. 377.
(4) (1929) A.C. 142, at p. 147.
(5) (1883) 8 App. Cas. 767, at p. 778.

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word in its business or commercial sense is to moneys that are received by a patentee in respect of the use of the patent by a licensee of the patent or by an author from a publisher for the right to publish a literary work.

The word " royalty " is also commonly applied to moneys which the lessee of a mine pays to the lessor for the right to work it : the amount of the royalty may be fixed by reference to quantities of material won from the mine. Hence in its business or commercial sense the word may be used to refer to moneys which are part of the proceeds of the sale of a capital asset.

Section 26 (*f*) uses the general term " royalty." It does not seem that the necessary intendment of the Act is that this provision should be read subject to a limitation excluding moneys which are of the nature of capital receipts. The provision applies to all moneys of which it is, according to business usage, true to say that the moneys are received as or by way of royalty, whether they are in the nature of capital or income moneys.

In the reasons for their decision the members of the Board have cited decisions showing that the word " royalty " has a more general application than to payments made in connection with the use of patents and copyright and the working of a mine. These cases are *Roberts* v. *Lord Belhaven's Executors* (1) ; *Shingler* v. *P. Williams and Sons* (2) ; *British Salmson Aero Engines Ltd.* v. *Inland Revenue Commissioners* (3) ; *Jones* v. *Inland Revenue Commissioners* (4) ; *Minister of National Revenue* v. *Spooner* (5) ; *Akers* v. *Commissioner of Taxes* (*N.Z.*) (6) ; *Kauri Timber Co. Ltd.* v. *Commissioner of Taxes* (*N.Z.*) (7).

The taxpayer received the moneys which are now in question under an agreement between himself and a sawmiller. The main provisions of the agreement are :—(1) The vendor agrees to sell and the purchaser agrees to purchase the right to cut and remove the standing milling timber now growing on the vendor's property which is described and is stated to contain one thousand two hundred and sixty-seven acres at or for the price or royalty of three shillings (3s.) for each and every one hundred (100) superficial feet of such milling timber so cut. (2) The purchaser

(1) (1925) 9 Tax Cas. 501.
(2) (1933) 17 Tax Cas. 574.
(3) (1938) 22 Tax Cas. 29, at p. 35.
(4) (1919) 7 Tax Cas. 310 ; (1920) 1 K.B. 711.
(5) (1933) A.C. 684.
(6) (1926) G.L.R. (N.Z.) 259.
(7) (1912) 31 N.Z. L.R. 617 ; (1913) A.C. 771.

covenants and agrees that he will cut and remove or cause to be cut and removed from the said property all milling timber within a period of twelve months from 29th February 1940. This clause contains a proviso that if the work of cutting and removing the said timber is delayed owing to wet weather, strikes, lock-outs or act of God the purchaser shall be entitled to a reasonable extension of time to enable him to complete the said work, such extension, however, is not to exceed the time during which he has been delayed as aforesaid, and a further proviso that the purchaser shall not remove any timber from the said property until he has removed all millable timber from another portion of land in terms of an agreement entered into by "the purchaser" with another party, Patrick Joseph McCauley.

Other provisions of the agreement in the present case are :—(4) All timber to be cut in pursuance of this agreement shall be cut in a face and no millable timber is to be missed or left on the said property. (5) All timber destroyed or damaged by the careless or incompetent workmanship of cutters or carters shall be paid for by the purchaser at the same rate as that provided in clause 1 hereof. (7) The purchaser agrees to construct and instal grids on the said property wherever it is necessary for him to enter the said property or any part thereof through a boundary or subdivisional fence and such grids shall be the only means of ingress and egress to the said property to be used by the purchaser or any of his sub-contractors or employees or agents and such grids shall be so constructed as to prevent the passage of livestock over the same. The purchaser shall also erect proper straining posts on each side of such grids and shall properly attach the wires of the fences thereto. (8) No tree having a centre girth excluding the bark of less than forty-eight inches shall be cut under this agreement. (15) Nothing in this agreement is to be construed as a guarantee that the said property contains any specific quantity of timber and the purchaser accepts all risks in respect of quantity, quality, girth, accessability and other like matters pertaining to the timber the right to cut and remove which is given by this agreement. (16) The rights and privileges acquired by the purchaser under this agreement shall not be assigned or transferred without the permission in writing of the vendor. (17) Subject to the provisions of clause 18 hereof the vendor shall have the exclusive right to graze livestock on the said property and such livestock

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shall not in any way be interfered with by the purchaser or his sub-contractors, employees, servants or agents.

The agreement did not transfer to the sawmiller the taxpayer's property in the standing milling timber growing on his property (*James Jones & Sons Ltd.* v. *Earl of Tankerville* (1); *Kursell* v. *Timber Operators and Contractors Ltd.* (2)). What the taxpayer "sold" to the sawmiller was "the right to cut and remove the standing milling timber growing" on the taxpayer's property and the sawmiller covenanted to cut and remove all such timber within a specified time: the interests which the sawmiller acquired under the agreement are described as rights and privileges: the consideration is described as a price or royalty, and it is based on a specified number of superficial feet of the milling timber cut in the exercise of these rights and privileges. The timber was goods to which the provisions of the *Sale of Goods Act* applied after it was cut and put in a condition in which it was removable from the land and the property in the timber then passed to the sawmiller: See *Morison* v. *A. & D. F. Lockhart* (3).

In form and effect the taxpayer granted a right to the sawmiller, which he covenanted to exercise, to cut and remove the milling timber, above the specified girth, from the taxpayer's trees growing on his land, in consideration of three shillings for every hundred superficial feet of milling timber which the sawmiller cut. The parties described this sum as a price or royalty. As the consideration for the sale of the milling timber when it was turned into "corporeal moveables" it was apt to describe this sum as a price. But as the moneys there described were the consideration for the right which the taxpayer granted to cut and remove the milling timber from the trees growing on his land it is, in my opinion, in accordance with the ordinary business usage of the expression "royalty" to say that the taxpayer received such moneys "as or by way of royalty."

The distinction between this case and that of *Thomson* v. *Deputy Federal Commissioner of Taxation* (4) is, I think, clear upon a mere perusal of the facts and decision in that case.

The application of the provisions of s. 26 (*f*) of the Act may result in hardship in certain cases if the whole of the moneys received by

(1) (1909) 2 Ch. 440.
(2) (1927) 1 K.B. 298.
(3) (1912) Sess. Cas. 1017.
(4) (1929) 43 C.L.R. 360.

a taxpayer as or by way of royalty comes in in one year: this is a question which may be thought worthy of attention by the other branches of the Government.

In my opinion the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Hawthorn Cuppaidge & Co.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

B. J. J.