[HIGH COURT OF AUSTRALIA.]

HOTEL KINGSTON LIMITED . . . APPELLANT;

AND

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

H. C. OF A. 1944.

SYDNEY, *Aug.* 4; *Sept.* 25.

McTiernan J.

Income Tax (Cth.)—Assessable income—Deduction—Residential hotel—Expenditure incurred by lessee—Improvements to leased property—"Tenant rights"—Income Tax Assessment Act 1936-1941 (*No.* 27 *of* 1936—*No.* 69 *of* 1941), *s.* 88 (2)*—*City Area Leases Ordinance* 1936-1938 (*A.C.T.*), *clause* 19A.

The words "tenant rights" in s. 88 (2) of the *Income Tax Assessment Act* 1936-1941 are capable in their legal acceptation of applying to the right which any lessee has at the expiration of his lease to receive compensation for improvements effected by him on the land and they have a general application, not a limited and specific application to the rights of agricultural and pastoral tenants only.

APPEAL from the Federal Commissioner of Taxation.

Hotel Kingston Ltd., a company which carried on the business of a residential hotel on land situate at Canberra, Australian Capital Territory, and leased by it from the Commonwealth of Australia, appealed to the High Court under s. 187 of the *Income Tax Assessment Act* 1936-1941 against the disallowance by the Federal Commissioner of Taxation of a deduction of seventy-five pounds which the company claimed it was entitled to have made under s. 88 (2) of the Act from its income for the year ended 30th June 1941.

The appeal was heard by *McTiernan* J., in whose judgment the relevant facts are sufficiently set forth.

* Section 88 (2) of the *Income Tax Assessment Act* 1936-1941 provides as follows:—"Where a taxpayer, who in the year of income is a lessee of land used for the purpose of producing assessable income has, either before or after the commencement of the lease, incurred expenditure in making improvements not subject to tenant rights on that land . . . a proportionate part of the amount of that expenditure . . . shall be an allowable deduction."

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HOTEL KINGSTON LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Sept. 25.

Maughan K.C. and *McKillop*, for the appellant.

Weston K.C. and *Beale*, for the respondent.

Cur. adv. vult.

McTIERNAN J. delivered the following written judgment:—

The taxpayer brings this appeal under Part V., Div. 2, of the *Income Tax Assessment Act* 1936-1941. It is an appeal against the disallowance by the Commissioner of Taxation of a deduction of seventy-five pounds which the taxpayer claims that it is entitled to have made under s. 88 (2) of the Act from its income for the year 1940 to 1941.

At all material times the taxpayer was the lessee of land at Canberra on which it carried on the business of a residential hotel producing assessable income, and, at a time material for the purposes of the sub-section, it incurred expenditure by adding a wing to the hotel with the consent of the lessor, the Commonwealth of Australia. The sum of seventy-five pounds is the proportionate part of the expenditure thus incurred. This sum is arrived at by making the calculation which the sub-section requires to be made to ascertain the amount of the deduction which the sub-section allows. One of the conditions of the deduction is that the improvement, on which the expenditure was outlaid, is " not subject to tenant rights." Of the conditions necessary to entitle the taxpayer to the deduction claimed, this is the only condition which the Commissioner of Taxation says is not fulfilled.

In greater detail, what is established by the evidence and admissions is that the land on which the hotel is built contains an area of more than one acre and less than two acres and that it was leased by the Commonwealth on 7th August 1935, pursuant to the *City Area Leases Ordinance* 1924-1935, to Walter Patrick McGrath, for the term of ninety-nine years, to be used by the lessee for the purposes of a residential hotel at a rental and upon the covenants contained in the memorandum of lease. The covenants which it may be material to notice are covenants by the lessee to expend not less than £16,000 in erecting a building on the land and to use the land only for the purposes of a residential hotel, a covenant by the Commonwealth to accept a surrender of the lease, but disentitling the lessee in that event to compensation for any improvements upon the land, and a mutual covenant for a further lease, upon the expiration of the term, of the whole of the land, if then available for leasing, or of such part as is available. The taxpayer purchased

the lease on 7th August 1936, together with the licence and goodwill of the hotel, and on 15th April 1940 the transfer of the lease to the taxpayer was registered in the office of the Registrar of Titles at Canberra. The lessor gave a consent to the improvements on 28th February 1939 ; the consent is sufficient for the purposes of s. 88 (2) ; and the improvements, consisting of the addition of a wing to the hotel, were made between that date and March 1940.

The Ordinance relating to the leasing of Commonwealth lands in the City Area of the Territory which determines the taxpayer's rights for the present purposes is the *City Area Leases Ordinance* 1936-1938. Clause 3 defines lease as including any lease granted under any repealed Ordinance. The provisions of clause 19A of this Ordinance came into force in 1938 ; s. 88 (2) of the *Income Tax Assessment Act* came into operation in 1936. Clause 19A bears a marginal note in these words : " Tenant right in improvements." The lessee of land upon which there are improvements is entitled under sub-clause 2, at the end of the term, to receive from the Commonwealth the value of the improvements, if the lessee is not granted a further lease of the land or is granted a lease of part only of the land.

The question which was argued before me is whether the right given to a lessee by clause 19A of the Ordinance comes within the legal acceptation of the words " tenant rights " in s. 88 (2) of the Act. It was not argued that the claim for the allowance of the deduction can be otherwise supported if this question is resolved against the taxpayer.

The rule for the construction of words and phrases in a statute is contained in the following statement in *Maxwell* on the *Interpretation of Statutes*, 3rd ed. (1896), pp. 2, 3 :—" The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not, and that the phrases and sentences are to be construed according to the rules of grammar ; and from this presumption it is not allowable to depart, where the language admits of no other meaning ; nor, where it is susceptible of another meaning, unless adequate grounds are found, either in the history or cause of the enactment or in the context or in the consequences which would result from the literal interpretation, for concluding that that interpretation does not give the real intention of the legislature." See also *Craies* on *Statute Law*, 3rd ed. (1923), p. 158, and *Beal's Cardinal Rules of Legal Interpretation*, 3rd ed. (1924), p. 362.

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It is argued on behalf of the taxpayer that the words " tenant rights " in s. 88 (2) make up a technical term which has a definite and specific application in law to a particular set of rights enjoyed by tenants using their holdings only for agricultural or pastoral purposes and that for this reason the improvements on which the taxpayer made the outlay, which is the basis of the claim for the deduction, are " not subject to tenant rights " within the meaning of s. 88 (2) ; but the argument does not involve that the improvements made by the taxpayer are outside clause 19A (2) of the Ordinance.

The words " tenant " and " right " are words to which the law attaches a meaning. In s. 88 (2) the former is used as an adjective, and the two words make a kind of compound noun which suggests, I think, a particular class of rights belonging to tenants generally rather than a particular class of rights of a special class of tenants. Nothing in the language of s. 88 (2) indicates the intention, unless the intention is implicit in the words " not subject to tenant rights," to withhold the deduction for which the sub-section provides only from taxpayers who are the tenants of agricultural or pastoral lands, and who, as such tenants, enjoy certain rights in respect of improvements, while allowing the deduction to all other taxpayers who are lessees of land used for the production of assessable income and are entitled to compensation for improvements, provided the right of compensation does not come within the limited specific meaning which in the argument for the taxpayer it was sought to put upon the apparently general expression " tenant rights."

To state the matter precisely, the words " tenant-right," not " tenant rights," are used as a technical term in connection with agricultural holdings. An instance of the use of the term in that connection is to be found in the declaration in the action *Senior* v. *Armytage* (1). Other instances of the use of the words as a technical term, but with a different application, are revealed by *Harper* v. *Midleton* (2) and *Doe* v. *Huntington* (3).

The matters comprised by " tenant-right " when the term is used in relation to agricultural holdings, and this is its most common application, are set forth in *Halsbury's Laws of England*, 2nd ed., vol. 10, p. 45, under the heading " Usages between Landlord and Tenant," *Redman's Law of Landlord and Tenant*, 8th ed. (1924), pp. 651 et seq., *Foa—Relationship of Landlord and Tenant*, 5th ed. (1914), pp. 700 et seq., and the *Encyclopaedia of the Laws of England*, 3rd ed. (1938), vol. 1, pp. 272 et seq.

(1) (1816) Holt 197 [171 E.R. 212].
(2) (1583) Choyce Cases 180 [21 E.R. 104].
(3) (1803) 4 East 271 [102 E.R. 834].

One matter of tenant-right discussed in those works is compensation payable for unexhausted improvements, upon quitting, to the tenant of an agricultural holding, by virtue of the custom of the country or agreement: at common law the tenant had no right of compensation for improvements.

The above-mentioned works also contain an account of the statutory provisions regulating the rights of outgoing tenants of lands used for agriculture or pasture. In *Foa's* work only these statutory provisions are discussed specifically under the name tenant-right. Those provisions are set forth in *Redman's* work under the title "Tenant's Compensation Acts"; in the *Encyclopaedia of the Laws of England* (3rd ed. (1938), vol. 1, p. 282) under the title "Statutory Compensation"; and in *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 351, in the section headed "Compensation," of the article on Agriculture. It has been observed that the nature of tenant-right is described in vol. 10 of the last-mentioned work under the heading "Usages between Landlord and Tenant": the learned author of this article states that the usages which regulate the rights of the outgoing tenants of farms prevailed under the name of "Customs of the Country" or "Tenant-right." For an example of an allegation of such a custom in pleadings reference may be made to *Wigglesworth* v. *Dallison* (1).

In the English *Agricultural Holdings Act* 1923 there is a general saving of the rights which agricultural tenants enjoy by virtue of "customs" or agreement. The rights are not saved under the name of tenant-right.

If the words "tenant rights" in s. 88 (2) of the *Income Tax Assessment Act* refer only to the rights of outgoing tenants of agricultural or pastoral lands there would be a difficulty in deciding whether the words denote the rights depending on statute as well as the non-statutory rights. The argument for the taxpayer is that their exact denotation is the two classes of rights. This implies, however, that the subject matter of tenant-right, regarded as a term applying to compensation to which a tenant is entitled for improvements, is not a closed category; although the argument means that the category is strictly limited to improvements used for agricultural or pastoral purposes.

There is no statement in the above-mentioned authorities which would, in my opinion, make it erroneous to hold that the words "tenant rights" are capable of a general application and of extending to the right which any lessee of land enjoys to receive compensation for improvements when the lease ends.

(1) (1779) 1 Dougl. 201 [99 E.R. 132].

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Section 88 (2) of the *Income Tax Assessment Act* does not exhibit any intention to differentiate between agricultural and pastoral tenants on the one hand and other lessees on the other hand; and the context and manifest object of the sub-section suggest that great caution should be used in employing the dictionary of the law of English agriculture to interpret the meaning of the words used in it.

I can see no valid reason for assuming that Parliament intended to use the words "tenant rights" when enacting s. 88 (2) as the equivalent of the rights which only agricultural and pastoral tenants may enjoy with respect to improvements. The words are, in my opinion, capable in their legal acceptation of applying to the right which any lessee has at the end of the lease to receive compensation for improvements effected by him upon the land: and in s. 88 (2) they have, I think, a general application, not a limited and specific application to the rights of agricultural and pastoral tenants only.

It follows from this opinion that an improvement in respect of which a lessee is entitled to receive compensation upon the expiration of the term under clause 19A is not an improvement of which it would be true to say that it is "not subject to tenant rights" within the meaning of sub-s. 2 of s. 88 of the Act.

I arrive at this conclusion without the assistance of the marginal note on clause 19A. (The question whether the marginal note may be used as an aid to the interpretation of a statute is dealt with in *Craies* on *Statute Law*, 3rd ed. (1923), pp. 177-179.)

In my opinion the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *Parish, Patience & McIntyre.*

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

J. B.