

Appl  
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Ltd (1977)  
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[HIGH COURT OF AUSTRALIA.]

STANTON . . . . . APPELLANT ;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. *Income Tax (Cth.)—Assessable income—Royalty—Agreement to sell standing timber*  
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MELBOURNE,  
Oct. 17, 18 ;  
24.  
Dixon C.J.,  
Williams  
Webb,  
Fullagar and  
Kitto JJ.

*at a lump sum price based on amount standing on land whether cut and removed  
or not—Income Tax and Social Services Contribution Assessment Act 1936-1953  
(No. 27 of 1936—No. 28 of 1953) s. 26 (f).*

A taxpayer and his co-owner of certain land entered into an agreement with a sawmiller which provided in substance for the sale to the sawmiller of standing timber on the land, with a limitation as to quantity, at a lump sum price based upon the amount of timber found to be standing upon the land whether such timber was cut or removed or not. The price for the timber was payable in quarterly instalments which became due independently of the amount of timber removed, so that the full price remained payable without regard to the extent to which the sawmiller might exercise his right to cut and remove the timber. The taxpayer was assessed to tax on the sum of £2,832, being his proportion of the amount payable under the agreement received by him in one fiscal year, the commissioner claiming that it was income received “as or by way of royalty” within the meaning of s. 26 (f) of the *Income Tax and Social Services Contribution Assessment Act 1936-1953*.

*Held*, that as the amounts under the agreement were payable by the sawmiller whether or not he exercised his right to cut and remove the timber and were calculated not on the amount taken, the sum in question was not received “as or by way of royalty” within the meaning of s. 26 (f) and accordingly did not form part of the taxpayer’s assessable income.

It is inherent in the conception expressed by the word “royalty” that payments for a right granted should be made in respect of particular exercises of the right and therefore should be calculated either in respect of the quantity or value of the substance taken under the right or the occasions upon which the right is exercised.

*McCauley v. Federal Commissioner of Taxation* (1944) 69 C.L.R. 235, distinguished.



## CASE STATED.

Royal Douglas Stanton appealed to the High Court against an assessment of income tax under the *Income Tax and Social Services Contribution Assessment Act* 1936-1953. The appeal was heard before *Dixon* C.J. who, on 5th August 1955, stated the following case for the opinion of a Full Court:—

1. The appellant herein Royal Douglas Stanton of Jimna, via Kilcoy, Queensland, grazier, and one Charles Edward Stanton, were at all material times the registered proprietors as tenants in common of all that piece or parcel of land described as portion 198 in the County of Lennox, Parish of Yabba, containing 1,912 acres, being the whole of the land contained in certificate of title No. 345454 vol. 1840 fol. 194, hereinafter referred to as “the said land.”

2. The appellant and the said Charles Edward Stanton on the one hand and David August Thurecht, sawmiller, on the other hand entered into an agreement in writing dated 12th September 1951 relative to certain timber standing on the said land. The said agreement, omitting formal parts, was as follows:—1. The vendors hereby sell and the purchaser hereby purchases, (a) five hundred thousand (500,000) super feet of millable pine timber now standing on the said land, and (b) two million five hundred thousand (2,500,000) super feet of millable hardwood timber now standing thereon together with the right to cut and remove the said timber from the said land provided however that such sale and purchase shall not extend to any pine timber which has a girth breast high over bark of less than forty-eight (48) inches nor to any hardwood timber which has a girth breast high over bark of less than sixty (60) inches and the said pine and hardwood timbers hereby sold shall except where the context otherwise indicates be referred to hereinafter as “the said timber”. 2. The purchase price therefor shall be the sum of seventeen thousand five hundred pounds (£17,500) and shall be apportioned as follows, that is to say, for the pine timber as aforesaid the sum of seven thousand five hundred pounds (£7,500), and the hardwood timber as aforesaid the sum of ten thousand pounds (£10,000) and the said sum of seventeen thousand five hundred pounds (£17,500) shall be paid by the purchaser to the vendors in manner following, that is to say by a deposit of five hundred pounds (£500) on the execution hereof and the balance namely the sum of seventeen thousand pounds (£17,000) by twelve (12) equal quarterly payments of one thousand four hundred and sixteen pounds thirteen shillings and fourpence (£1,416 13s. 4d.) each the first of such payments to become due for payment by the purchaser on 1st November 1951 and thereafter

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such payments shall become due for payment on the 1st days of February, May, August and November in every year until the balance of the said purchase money shall be fully paid and discharged. 3. No interest shall be paid by the purchaser. 4. For the consideration herein mentioned the vendors will permit and allow the purchasers and/or his duly appointed agents or servants for a period of three years from the said 1st August 1951 to enter upon the said land and to fell thereupon the said timber until the several quantities thereof hereby sold are produced and to remove all such logs from the said land and generally to carry out his operations hereunder provided however and it is hereby agreed that the purchaser shall fell log and remove hereunder in each year no less than two hundred thousand (200,000) super feet of pine timber as aforesaid and eight hundred thousand (800,000) super feet of hardwood timber as aforesaid. 5. The purchaser as to the said pine timber will cut into the tops of the trees to the fullest extent in accordance with the custom for the time being prevailing in the timber industry in the district. 6. Measurements of all the said timber felled and logged including pipe measures and log measures shall be taken on the said land and such measures together with the log number shall be marked on each log and the stump thereof. 7. For the more effectual carrying out hereof the vendors hereby grant unto the purchaser and/or his duly appointed agents, servants or contractors full and free right of ingress, egress and regress to over upon and from the above described land and with or without animals vehicles plant and equipment together with a like right in favour of all persons with or without animals vehicles plant and equipment lawfully doing business with the purchaser his agents, servants, or contractors. 8. The vendors hereby further grant unto the purchaser a right in the purchaser to undertake and provide all necessary and reasonable facilities for the falling and haulage of timber on and from the above-described land and will permit and allow the purchaser to erect and move upon and remove from the said land temporary structures or buildings which in the opinion of the purchaser are necessary for his operations hereunder provided always however such structure or buildings shall be wholly removed at the expiration hereof. 9. All operations on the part of the purchaser hereby authorized shall be carried out in a proper and workmanlike manner and so as to cause as little injury as possible to the said property or to the livestock grazing thereon. 10. The vendors covenant with the purchaser for quiet enjoyment during the continuance of this agreement or any extension hereof of his rights interests and authorities under this agreement. 11. The



purchaser shall be entitled to leave in the ground the stumps and upon the ground the head of each and every tree felled hereunder. 12. All gates and/or other outlets as agreed upon between the vendors and the purchaser and which are used by the purchaser and/or his duly authorized agents servants and contractors whether in carrying out the terms of this agreement or otherwise shall be kept closed and securely fastened in such manner as to prevent the straying of livestock on to or from the said land. 13. Nothing in this agreement is to be construed so as to effect or interfere with the right of the vendors to depasture livestock on the said land during the term of this agreement or any extension thereof. 14. The rights and privileges acquired by the purchaser under this agreement shall not be assigned or transferred without the permission in writing of the vendors. 15. Any damage done to the said property or the fences or improvements thereon by the fallers, haulers or others engaged in cutting and removal of the timber hereby sold shall forthwith be made good by the purchaser and in default thereof the amount of such damage may be recovered by the vendors from the purchaser. 16. The vendors hereby expressly agree with the purchaser that the vendors will not sell or agree to sell to any purchaser the said land without first disclosing to such purchaser or intending purchaser the existence of this agreement. 17. The purchaser covenants that neither he nor his sub-contractors employees servants or agents will use or permit to be used any fire-arms on the said property. 18. Subject always to the rights and interests of the purchaser conferred on him by this agreement if the vendors shall during the continuance of this agreement sell the said property they shall be entitled to assign their interest in the said agreement to the purchaser of the said property and the vendors shall not thereafter have any further interest in the said agreement or be concerned or interested herein other than in respect of any money due or owing or to become due or owing by the purchaser to the vendors hereunder or be liable to the purchaser for any subsequent breach or non-performance of the terms and conditions herein contained. 19. If the purchaser shall at any time fail or neglect to pay the moneys payable under this agreement at the times and in the manner hereinbefore mentioned or otherwise to duly observe and comply with the terms and conditions hereof or any of them the vendors may in default of such payment or non-observance as aforesaid after the expiration of fourteen days from the date on which demand has been made therefor cancel and determine this agreement and in the event of such cancellation and determination as aforesaid the deposit and any other moneys

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which may be standing to the credit of the purchaser in respect of this agreement shall be absolutely forfeited to the vendors and the property in the said timber hereby sold or such parts thereof respectively as shall not have been removed by the purchaser shall revert to the vendors. 20. If it shall be found that there are not five hundred thousand (500,000) super feet of millable pine timber of the size and description as aforesaid standing upon the said land then and in such case the purchaser shall be entitled to a rebate of the purchase price of seven thousand five hundred pounds (£7,500) hereby agreed upon in respect thereof of a sum which bears the same proportion to the said sum of seven thousand five hundred pounds (£7,500) as the quantity of millable pine timber found to be short or deficient upon the said land bears to the five hundred thousand (500,000) super feet of such pine timber hereby sold and/or if it shall be found that there are not two million five hundred thousand (2,500,000) super feet of millable hardwood timber of the size and description as aforesaid standing upon the said land then and in such case the purchaser shall be entitled to a rebate of the said purchase price of ten thousand pounds (£10,000) of a sum which bears the same proportion to the said sum of ten thousand pounds (£10,000) as the quantity of millable hardwood timber found to be short or deficient upon the said land bears to the two million five hundred thousand (2,500,000) super feet of such hardwood timber hereby sold and in either or both of such cases as aforesaid if any purchase moneys shall have been paid by the purchaser to the vendors under this agreement in excess of the amount due by the purchaser to the vendors after deducting the said rebate or rebates such moneys shall forthwith be refunded by the vendors and may be recoverable by the purchaser. 21. The legal costs of and incidental to the preparation, execution and stamping hereof shall be borne and payable by the vendors and the purchaser in equal shares but all stamp duties and other outlays in connection therewith shall be borne and payable by the purchaser solely.

In witness whereof etc.

3. The sum of £2,832 was received by the appellant in the twelve months from 1st July 1952 until 30th June 1953 as his proportion of the amount payable by the said David August Thurecht in pursuance of the said agreement dated 12th September 1951.

4. On 24th November 1953 the appellant duly lodged with the Deputy Commissioner of Taxation at Brisbane a return of income for the said financial year ending 30th June 1953 and revealed the amount received by him under the said agreement in the said return of income as follows :—“ 3. Produce Account. Timber sold to



D. A. Thurecht Redcliffe, by contract dated 12/9/51 forwarded herewith for noting, claimed as exempt from tax—£2,832/10/0.”

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5. The deputy commissioner on 1st July 1954 issued a notice of assessment of income tax No. 182988 to the appellant based on income of the appellant derived during the taxable year ended 30th June 1953 and the deputy commissioner included in the said assessment as income from property of the appellant the said sum of £2,832. Accompanying the said notice of assessment forwarded to the appellant by the deputy commissioner was a document known as form 1.43. on which was indorsed “£2,832 received a/c timber included as being by way of royalty on timber.”

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6. The said assessment No. 182988 showed as taxable income from personal exertion the sum of £2,527 and from property the said sum of £2,832 a total of £5,359 on which the appellant was assessed in respect of tax and contribution and provisional tax and contribution and the amount of tax payable was shown as £3,540.

7. The appellant duly made objection in writing to the said assessment by notice in writing dated 28th July 1954 and in the said notice of objection the appellant claimed that the said assessment should be reduced by excision therefrom of the said sum of £2,832 included in the assessment as income from property being proceeds of standing timber received by him in the said income year on the following ground, *inter alia*: “The said sum of £2,832 is not an amount received by me as or by way of royalty within the meaning of s. 26 (f) of the *Income Tax and Social Services Contribution Assessment Act 1936-1953*”.

8. The deputy commissioner after considering the objection disallowed it and on 11th March 1955 gave written notice to the appellant of such disallowance.

9. The appellant being dissatisfied with the said decision pursuant to s. 187 of the *Income Tax and Social Services Contribution Assessment Act 1936-1953* requested the deputy commissioner to treat his objection as an appeal and to forward it to the High Court of Australia which the respondent duly did accordingly.

10. The question stated for the opinion of a Full Court is:—  
“Was the said sum of £2,832 rightly included in the assessable income of the appellant as being an amount received by him as or by way of royalty within the meaning of s. 26 (f) of the *Income Tax and Social Services Contribution Assessment Act 1936-1953*?”

*L. G. Lukin* (with him *W. B. Campbell*), for the appellant. There was no relationship between the purchase price of the timber and the



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amount cut and taken off the land. Accordingly the payments were not royalties. [He referred to *Thomson v. Deputy Federal Commissioner of Taxation* (1); *McCauley v. Federal Commissioner of Taxation* (2); *Stroud's Judicial Dictionary*, 3rd ed. (1953), vol. 3, at pp. 2631, 2632.]

[FULLAGAR J. referred to *Pacific Coal Co. Pty. Ltd. v. Perpetual Trustee Co. (Ltd.)* (3).]

It is not contended that the taxpayer was carrying on a business of selling timber. Section 26 (f) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 is dealing with income, not capital. If the words of a fiscal statute are ambiguous the matter should be resolved in favour of the subject. [He referred to *Brunton v. Commissioner of Stamp Duties* (4); *Commissioner of Taxes v. Executors of Rubin* (5); *Anderson v. Commissioner of Taxes (Vict.)* (6).]

*A. L. Bennett* Q.C. (with him *G. Seaman*), for the respondent. There was a definite relationship under the agreement between the price paid and the amount of timber cut. The purchaser was under a duty to cut and remove the timber sold. For this purpose he had a right to enter the land. There was provision for adjustment of the price in accordance with the amount of timber of the description found to be present. It was decided in *McCauley v. Federal Commissioner of Taxation* (7) that s. 26 (f) of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 embraces payments in the nature of capital as well as income. The definition of "royalty" by *Latham C.J.* (8) covers the payments in issue in the present case. *Thomson v. Deputy Federal Commissioner of Taxation* (1) is distinguishable from the present case in that the timber sold was the sale of a capital asset not involving any calculation in relation to quantity. There was a sale of goods in the present case. [He referred to *Marshall v. Green* (9); *Kursell v. Timber Operators & Contractors* (10).] In order to determine the character of a payment the real basis must be examined. [He referred to *Constantinesco v. The King* (11); *Inland Revenue Commissioners v. British Salmson Aero Engines Ltd.* (12); *Glasson*

(1) (1929) 43 C.L.R. 360.

(2) (1944) 69 C.L.R. 235, at pp. 241, 244, 248.

(3) (1954) 91 C.L.R. 486.

(4) (1913) A.C. 747, at p. 760.

(5) (1930) 44 C.L.R. 132, at p. 148.

(6) (1937) 57 C.L.R. 233, at p. 243.

(7) (1944) 69 C.L.R. 235.

(8) (1944) 69 C.L.R., at p. 241.

(9) (1875) 1 C.P.D. 35.

(10) (1927) 1 K.B. 298, at pp. 308 et seq.

(11) (1926) 11 Tax. Cas. 730, at p. 742.

(12) (1938) 2 K.B. 482, at pp. 495, 500, 505, 506, 507.



v. *Rougier* (1); *Nethersole v. Withers* (2); *Commissioners of Inland Revenue v. Longmans Green & Co. Ltd.* (3); Recent Cases —Notes and Comments (4).]

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*L. G. Lukin* in reply.

*Cur. adv. vult.*

THE COURT delivered the following written judgment :—

This is a case stated under s. 198 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953. The appeal in which the case is stated is against an assessment based on income derived by the taxpayer during the twelve months ended 30th June 1953. The commissioner included in the assessable income a sum of £2,832 on the footing that it was received by the taxpayer as or by way of royalty paid in respect of certain timber.

Section 26 (f) of the *Assessment Act* provides that the assessable income of a taxpayer shall include any amount received as or by way of royalty. The word "royalty" is not defined by the Act and the question in the case is whether the payments which the commissioner has included in the assessment of income possess the attributes connoted by that word as it stands in the Act.

The facts upon which the matter depends may be briefly stated. It appears that the taxpayer who is a grazier was entitled as tenant in common with another grazier to a piece of land upon which stood a quantity of pine timber and of hardwood timber. On 12th September 1951 they entered into an agreement in writing with a sawmiller who was desirous of purchasing certain of the timber. In the agreement they were described as the vendors and the sawmiller as the purchaser. The first clause stated that the vendors thereby sold and the purchaser thereby purchased five hundred thousand super feet of millable pine timber and two million five hundred thousand super feet of millable hardwood timber with the right to cut and remove the timber from the land. If trees were less in girth than certain measurements they were excluded. The second clause provided that the price should be £17,500, of which £7,500 was apportioned to the pine timber and £10,000 to the hardwood timber. Of the price £500 was to be paid as a deposit and £17,000 by equal quarterly payments of £1,416 13s. 4d. without interest. The amount of £2,832 which the commissioner claims to be a royalty and has included in the taxpayer's assessable income

(1) (1944) 1 All E.R. 535.

(2) (1946) 1 All E.R. 711 (C.A.);  
(1948) 1 All E.R. 400 (H.L.).

(3) (1932) 17 Tax. Cas. 272, at pp.  
283, 284.

(4) (1946) 20 A.L.J. 181.



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forms his proportion (no doubt half) of the payments made under the agreement by the purchaser during the year of income.

Upon the question whether the payments fill the character of a royalty there are some other provisions in the agreement that have some importance. They make it quite clear that the moneys are not calculated by reference to nor payable in respect of the timber actually cut or removed and that cutting or removal is not the occasion of the payments. Further, there are certain general provisions which form part of the consideration for the lump sum payments. A provision for default says that if the purchaser should at any time fail in the quarterly payments the vendors should be at liberty to cancel the agreement and in that event the deposit and any other moneys which might be standing to the credit of the purchaser were to be forfeited and the property in the timber or such parts as should not have been removed should revert to the vendors. The word "revert" is of course not technically appropriate. For as need hardly be said, in no proper sense could the agreement vest the property in the timber in the purchaser. But the clause does mean that the purchaser lost in the case of default all right to obtain further timber whilst the vendors retained whatever instalments he had paid.

Another clause provided that if it should be found that there was not five hundred thousand super feet of millable pine timber or two million five hundred thousand super feet of millable hardwood timber respectively standing upon the land then there should be a proportionate rebate of the price. The proportionate rebate was to be the sum which bore the same proportion in the case of pine timber to the price (£7,500) as the quantity of millable timber found to be short or deficient upon the said land bore to five hundred thousand super feet. A similar proportion *mutatis mutandis* was fixed for hardwood timber.

The agreement contained a number of ancillary clauses. Some regulated the manner in which the purchaser was to do his part. For example the measurement of the timber was to be made upon the land and the purchaser was to cut into the tops of the pine trees to the fullest extent in accordance with the custom prevailing. Others amplified the rights of the purchaser. Thus he, his agents, servants and contractors and all persons doing business with him were given full and free right of ingress etc. with vehicles, plant and equipment. He was to have the right to undertake and provide all necessary and reasonable facilities for falling timber and hauling it and the right to erect and move upon and remove from the land



temporary structures or buildings which in his, the purchaser's, opinion were necessary for his operations.

It will be seen that in substance the agreement amounts to a sale of standing timber, with a limitation as to quantity, at a lump sum price based in the end upon the amount of timber found to be standing upon the land whether the timber was cut or removed or not. It will be seen too that the price was payable in quarterly instalments which became due independently of the amount of timber removed, so that the full price remained payable without regard to the extent to which the purchaser might exercise his right to cut and remove the timber.

At first sight it is not easy to see in this any of the essential characteristics of a royalty. It is said, however, that the definition of a royalty given in *McCauley v. Federal Commissioner of Taxation* (1) governs the matter and requires us to hold that the quarterly payments are in the nature of royalties.

In that case the landowner entered into an agreement to sell to the purchaser and the purchaser to purchase a right to cut and remove standing timber growing on the land at or for the price or royalty of three shillings for each and every hundred superficial feet of such milling timber so cut. The purchaser agreed to cut and remove all milling timber within a period of twelve months from the specified date. It will be seen at once that a marked difference exists between the agreement in *McCauley's Case* (1) and the present. The amount payable in *McCauley's Case* (1) was in respect of the timber cut and it was calculated thereon by reference to the quantity cut. There was no sale of a stand of timber and no price based on the amount of timber standing. There was a right to proceed to cut timber and obligation to do so but the liability to make payments arose if and when the timber was cut and then it was to pay an amount calculated at a specified rate upon the quantity cut. The parties described the amount as a royalty and the majority of the Court (*Latham C.J.*, *McTiernan J.*, *Rich J.* dissenting) adopted the view that it had been correctly described. *Latham C.J.* discussed the meaning of the word "royalty" and referred to the senses in which it had been defined and used. For the purpose of showing that the word might be applied to payments for timber cut under licence, his Honour relied in particular upon the manner in which it was used in certain State statutes. The learned Chief Justice went on to say: "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

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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" (1). It will be noticed that the facts of the present case do not satisfy the condition stated in his Honour's definition by the words "where those payments are made in relation to the quantity of timber cut or removed". When his Honour speaks of "payments made by a person for the right to enter upon land for the purpose of cutting timber of which he becomes the owner" his Honour is obviously not emphasizing the right to enter upon the land as opposed to the right to remove the timber. The point of the definition appears rather to lie in a requirement that the payments should be made to the landowner in relation to the quantity of timber cut or removed in pursuance of a right to do so.

In the course of his judgment *McTiernan J.* (2) pointed out that the consideration in McCauley's agreement was described as a price or royalty and that it was based on a specified number of superficial feet of the milling timber cut in the exercise of the rights and privileges granted by the agreement. There followed a passage which brings together the grounds on which his Honour decided that the payments were royalties. His Honour said: "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.'" (2). In his judgment *Rich J.* drew a distinction between on the one hand a contract amounting to the sale of existing trees as chattels and on the other hand a contract creating 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. His Honour described a contract of the latter

(1) (1944) 69 C.L.R., at p. 241.

(2) (1944) 69 C.L.R., at p. 248.



description as not one of sale but as creating a *profit à prendre*. “ 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* ” (1). His Honour regarded McCauley’s contract as amounting to no more than the sale of standing timber and on that ground he dissented.

The definition of royalty is widely expressed in the passages cited from the majority judgments, more widely than the decision of the case required, but it may be that it has received an interpretation even wider than their Honours contemplated. Little assistance is to be obtained from the history of the word. For, as Lord Selborne L.C. said in *Attorney-General of Ontario v. Mercer* (2), “ in its primary and natural sense ‘ royalties ’ is merely the English translation or equivalent of ‘ regalitates ’, ‘ *jura regalia* ’, ‘ *jura regia* ’ ” (3). To say that the uses of the word are now figurative and represent analogies to the revenues which some *jura regalia* were seen to yield to the Crown does not help much to ascertain the scope of present usage. It may be noted, however, that the modern applications of the term seem to fall under two heads, namely the payments which the grantees of monopolies such as patents and copyrights receive under licences and payments which the owner of the soil obtains in respect of the taking of some special thing forming part of it or attached to it which he suffers to be taken. It is not fanciful to trace the extension of the word by analogy from the kind of payments which some of the *jura regia* enabled the Crown to obtain. We are not concerned with that application of the word which relates to payments to a patentee owner of a copyright or even of a secret process in respect of articles produced or sold, or books printed or sold or works performed or exhibited under his licence. What matters here is the parallel though distinct development of the meaning of the word which seems to arise from payments made to the Crown in respect of metals and the like won or taken from the soil. Similar payments to the owners of mines are regarded as royalties and by an extension not difficult to follow payments made in respect of the taking under the agreement or licence of the owner of land of anything which may be considered part of or naturally attached to the soil such as coal, stone, sand, shells, oil and standing timber came to be spoken of as royalties. Warren and piscary and such rights are not heard of amongst us but conceivably there may be things made the subject of royalty which belong to ownership of land that cannot be considered actually to be part of the soil.

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(1) (1944) 69 C.L.R., at p. 244.  
(2) (1883) 8 App. Cas. 767.

(3) (1883) 8 App. Cas. 767, at p. 778.



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In the case of monopolies and the like the essential idea seems to be payment for each thing produced or sold or each performance or exhibition in pursuance of the licence. In the same way in the case of things taken from the land the essential notion seems to be that the payment is made in respect of the taking of something which otherwise might be considered to belong to the owner of the land in virtue of his ownership. In other words it is inherent in the conception expressed by the word that the payments should be made in respect of the particular exercise of the right to take the substance and therefore should be calculated either in respect of the quantity or value taken or the occasions upon which the right is exercised.

In the present transaction between the graziers and the saw-miller this element is lacking. The transaction enabled the saw-miller and indeed bound him to take stands of timber for defined prices which were payable whether he exercised the right or not and the price was not calculated upon the amount taken but only upon the amount of timber of the described kind and girth found to be standing upon the land.

It follows that the payments were not royalties and ought not to have been included in the assessable income. The question in the case stated should be answered : No.

*Question in the case stated answered : No.  
Costs to be costs in the appeal.*

Solicitors for the appellant, *Hawthorn, Cuppaidge & Badgery*,  
Brisbane.

Solicitor for the respondent, *H. E. Renfree*, Crown Solicitor for  
the Commonwealth of Australia.

R. D. B.