[HIGH COURT OF AUSTRALIA.]

VICTORIA PARK RACING AND RECREATION GROUNDS COMPANY LIMITED . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1934.

SYDNEY, *Nov.* 30; *Dec.* 3, 20.

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

Income Tax (Cth.)—Special tax—Income derived in course of carrying on a business which if otherwise derived would be income from property—Income Tax Act 1931 (*No.* 24 *of* 1931), *sec.* 5 (1)*

The taxpayer company is the owner of a racecourse upon which it conducts race meetings. It is a member of an association of racing clubs which regulates and controls horse and pony racing upon the courses of its members. The association regulates also the registration of bookmakers and their clerks, the licensing of bookmakers to conduct the business of bookmaking on the courses of its members, and the fees payable therefor. It pays to the taxpayer one-fourth of the net fees which it receives from these sources. The taxpayer allots and regulates the positions on its racecourse which the licensed bookmakers may use in the conduct of their betting operations. Catering rights, that is, the right of selling refreshments on its racecourse, are granted by the taxpayer to various tenderers in consideration of certain sums paid to it by the tenderers. The tenderers have the exclusive right of using the refreshment rooms and liquor bars, but the taxpayer retains powers of supervision and control. Upon payment of certain prescribed fees owners and trainers of horses are, for the purpose of training their horses, permitted by the taxpayer to use certain training tracks constructed on its racecourse.

* Sec. 5 (1) of the *Income Tax Act* 1931, provides:—"In addition to any income tax payable under the preceding provisions of this Act, there shall be payable upon the taxable income derived by any person—(*a*) from property; (*b*) by way of interest, dividends, rents or royalties, whether derived from personal exertion or from property; and (*c*) in the course of carrying on a business, where the income is of such a class that, if derived otherwise than in the course of carrying on a business, it would be income from property, a further income tax of ten per centum of the amount of that taxable income."

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Held, by the whole Court, that so much of the appellant's taxable income as consisted of bookmakers' fees and registration fees was not subject to the further tax imposed by sec. 5 (1) (*c*) of the *Income Tax Act* 1931, but, by *Gavan Duffy* C.J., *Evatt* and *McTiernan* JJ. (*Rich*, *Starke* and *Dixon* JJ. dissenting), that so much of that income as consisted of moneys received in respect to catering rights and training fees, was so subject.

CASE STATED.

On the hearing of an appeal to the High Court by Victoria Park Racing and Recreation Grounds Co. Ltd. from an assessment of that company by the Federal Commissioner of Taxation for income tax for the year ended 30th June 1932, *Rich* J. stated a case, which was substantially as follows, for the opinion of the Full Court :—

1. This is an appeal by Victoria Park Racing and Recreation Grounds Co. Ltd. from an assessment of income tax under the *Income Tax Assessment Act* 1922-1931 for the financial year commencing on 1st July 1931 and based upon income derived in the year ending on 31st December 1930.

2. The appellant company is a company incorporated under the *Companies Act* of New South Wales carrying on the business of racecourse proprietor in that State and having its registered office at Sydney in that State and owns and occupies a racecourse called Victoria Park in the State.

3. Instead of a return of the total assessable income derived by the appellant during the financial year ending on 30th June 1931 the respondent accepted a return therefrom made up for the period of twelve months ending on 31st December preceding the financial year commencing on 1st July 1931.

4. On 24th June 1932 the Deputy Commissioner of Taxation assessed the amount of Federal income tax payable by the appellant in respect of the financial year commencing on 1st July 1931 at the sum of £1,452 18s. 2d., which sum included an amount of £764 12s. in the notice of assessment described as special tax—10 per cent of property income on £7,646 being the amount which the respondent then claimed to be the amount of the taxable income of the appellant derived from the sources set forth in sec. 5 of the *Income Tax Act* 1931. The amount of the assessment of £1,452 18s. 2d. was duly paid by the appellant.

5. The appellant on 18th July 1932, in a notice of objection, objected to the said assessment on the following grounds :—

(*a*) That the assessment was excessive as regards the amount of taxable income on which the special tax on property income had been charged.

(*b*) That the following amounts :—

Bookmakers' Fees	£5,100	0	0
Catering Rights	4,555	0	0
Training Fees	1,527	19	0
Stall Rents, Grazing Fees, etc.	105	12	6
Registration Fees	67	13	6
Parking Fees	13	19	0
Trotting—representing the net profit on trotting operations for the year	226	10	7
	£11,596	14	7

comprising the revenue upon which the special tax had been calculated were not liable to such tax.

(*c*) Alternatively, that the amount allowed as a deduction from the gross revenue treated as income from property was inadequate. All direct expenses incurred in gaining the revenue in question should have been allowed and in addition it was contended that all expenditure was incurred in gaining such revenue. Accordingly, after deducting direct expenses, the balance of the allowable expenditure for the year should have been apportioned between the amount finally determined as assessable to the property tax and the other revenue of the company and the proportion so ascertained as applicable to the property income should then have been deducted for the purpose of ascertaining the amount of taxable income from that source.

(*d*) That the assessment was excessive as regards the total amount of taxable income—£9,833—upon which the company was assessed.

(*e*) That the sum of £500, representing a refund from the Associated Racing Club's Insurance Fund, should be excluded from such taxable income.

6. On 17th November 1932 the Deputy Commissioner of Taxation issued an amended notice of assessment and adjustment sheet

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reducing the income taxable under sec. 5 of the *Income Tax Act* 1931 to £1,995, and the amount of the tax therein described as "Special Tax—10 per cent of Property Income" to £199 10s, and by letter of 22nd November 1932 addressed to the appellant the Deputy Commissioner of Taxation stated that the objection had been considered and it had been decided to allow the claims made therein to the extent indicated by the amended notice of assessment and adjustment sheet issued on 17th November 1932. Subsequently a refund of £565 2s. in consequence of the amended assessment was made to the appellant by the Taxation Department.

7. The appellant on 23rd November 1932 advised the Deputy Commissioner of Taxation that it was dissatisfied with his decision and requested the Deputy Commissioner to treat the objection as an appeal and to forward it to this Honorable Court, which he in due course did.

8. A true copy of the balance-sheet of the appellant as at the 31st December 1930 and of the profit and loss account of the appellant for the year ended 31st December 1930 is hereunto annexed.

9. The appellant conducted race meetings and permitted horses to be trained at Victoria Park Racecourse and derived income therefrom. Appellant conducted trotting meetings at the said racecourse under the name of "Australian Trotting Club" and hereunto annexed is a true copy of an account made up by the appellant for the year ended 31st December 1930 and described by it as its revenue account. The sum of £226 10s. shown in the said account as "Net profit for the year" is the sum of £226 10s. shown in the aforesaid profit and loss account as "Trotting."

10. The said profit and loss account and revenue account show (*inter alia*) receipts by the appellant in respect of bookmakers' fees, catering rights, training fees and registration fees in respect of which after making deduction of expenses the respondent has assessed the appellant to tax under sec. 5 of the *Income Tax Act* 1931.

11. The various items of revenue of the appellant referred to in the adjustment sheet referred to in par. 6 hereof and in the notice of objection which is referred to in par. 5 hereof are derived under the following circumstances:—(*a*) Bookmakers' fees £5,100 and £1,317 15s. These were part of the registration fees charged to approved

bookmakers who were licensed to carry on the business of bookmakers at race meetings conducted by the appellant at its said racecourse and other racecourses of other clubs (all of which were incorporated companies). The bookmakers' fees were collected by a body known as Associated Racing Club, which body consisted of appellant and three other Racing Clubs. Associated Racing Club among other matters relating to the racing operations of the said four clubs attended to the licensing of all bookmakers who were licensed by that body for all meetings conducted by those four clubs, and also attended to the registration of the bookmakers and their clerks and collected fees payable by the bookmakers and their clerks, and paid to each club one-fourth of the net fees received. Other matters in connection with the racing operations of the four clubs which were attended to by Associated Racing Club were the appointment of various officials to conduct the racing such as judge, starter and stipendiary stewards, and the licensing of trainers and jockeys. Before a bookmaker obtained a licence his financial position was thoroughly investigated by Associated Racing Club, satisfactory guarantees had to be given thereto, and he had to sign an undertaking in the form hereto annexed. Rule 203 of the By-laws, Regulations and Rules of Racing in the said undertaking mentioned is in the following form :—No person shall be permitted to carry on or to assist in carrying on the business of a bookmaker or to act as clerk to any person carrying on such business at any registered meeting, unless his name be entered in a register to be kept at the office of the Associated Racing Clubs for that purpose. Provided that any meeting held outside the metropolitan area shall be exempt from the operation of this rule, unless the board of management shall otherwise direct. (i.) The board of management may at any time remove from the register the name of any person if it shall be proved to the satisfaction of the board that such person is a defaulter in bets, or that he has committed any offence against the rules of racing, or for any other reason which may appear to them to be sufficient. (ii.) No horse wholly or partly owned by or leased to a person who carries on or assists in carrying on the business of a bookmaker or acts as clerk to any person carrying on such business, at any registered meeting, shall be entered for any race at any

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meeting within the metropolitan area, unless such horse shall be trained by a person licensed as a trainer or by a person holding a permit to train such horse granted by the board of management.

The appellant provided a suitable position for a betting ring, allotted the various positions within the betting ring to the individual registered bookmakers and before each race meeting placed betting stands or boxes (which were the property of the appellant) on the various positions allotted to registered bookmakers and removed them at the conclusion of each race meeting. The appellant has always claimed in its dealings with bookmakers that it has the right of determining what position in the betting ring any bookmaker should from time to time occupy and has from time to time acted in accordance with such claim without any claim by the bookmakers concerned that the appellant did not have such right. In practice a bookmaker generally occupied the same position on each race day throughout each quarter of the year, but the appellant did sometimes on its own motion without the assent of the bookmaker affected thereby change this position. The appellant has not in fact, after allotting a position in the betting ring to a bookmaker, changed that position during the course of the day for which it was allotted. Save in so far as any document herein set forth substantiates such claim there is no document substantiating such claim nor was there any express agreement that the appellant should have such right. The appellant provided a staff to clean its course including the betting ring and the duties of the Associated Racing Club's officials included that of seeing that the bookmakers conducted themselves properly and adhered to the betting rules and the rules for settlement of all betting and other disputes arising out of their operations.

(*b*) Catering rights, &c., £4,555 and £751 11s. This item is composed of the following amounts:—

Liquor bar and soft drinks ..	£3,420 0 0	£700 0 0
Catering	1,080 0 0	51 11 0
Tobacco Kiosk	55 0 0	
	£4,555 0 0	£751 11 0

The amounts of £3,420 and £700 in respect of the " Liquor Bar and Soft Drinks " were received from a caterer in pursuance of an agreement.

For the purposes of this appeal it is agreed by the parties that there is no material distinction between the facts relating to the catering and tobacco kiosk and those relating to the liquor bar and soft drinks.

(*c*) Training fees £1,527. These were fees collected by the appellant from horse trainers or owners for permitting them to train horses on the appellant's racecourse on certain days and at certain times. The company constructed and maintained special training tracks consisting of grass, tan, cinder and sand tracks. The necessary staff was employed to attend to the weeding, fertilising, watering and rolling of the tracks and the necessary expenditure was incurred for materials and water. Employees were employed at the racecourse during training operations to supervise same and to keep out unauthorized persons and to inspect the tracks to see that they were safe to train on and to specify what part of the track was to be used.

(*d*) Registration fees £46. These were appellant's proportion of fees charged by Associated Racing Club for the registration of bookmakers' clerks.

12. The providing of bookmakers and of caterers assists materially in the successful conduct of the appellant company's race meetings. With rare exceptions all bodies conducting race meetings in New South Wales make such provision.

The following questions were reserved for the consideration of the Full Court :—

(1) Is the appellant entitled as a matter of law upon the facts hereinbefore stated to a finding that the income derived from the items of revenue referred to in pars. 10 and 11 hereof or from any of them and if so which is not taxable income of the appellant subject to further income tax by virtue of sub-sec. 1 of sec. 5 of the *Income Tax Act* 1931 ?

(2) Is the respondent entitled as a matter of law upon the facts hereinbefore stated to a finding that the income derived from the items of revenue referred to in pars. 10 and 11 hereof or from any of them and if so which is taxable income

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of the appellant subject to further income tax by virtue of sub-sec. 1 of sec. 5 of the *Income Tax Act* 1931 ?

E. M. Mitchell K.C. (with him *Gain*), for the appellant. Arrangements made between the appellant and the bookmakers are arrangements of a contractual character. There are reciprocal rights. The income so derived is derived " in the course of carrying on a business " within the meaning of par. (*c*) of sec. 5 (1) of the *Income Tax Act* 1931, but is income from a feature which cannot be separated from the appellant's business of conducting race meetings. Par. (*c*) applies only to that class of operations which can be so separated, and has no application to an operation which cannot have any existence apart from carrying on the business. The agreed facts indicate that there was a leave and licence to carry on betting operations ; that the appellant required that the operations should be carried on, and that there was a duty on the part of the bookmakers to attend, and to provide betting facilities. Money received for " leave and licence " to enter a racecourse for the purpose of carrying on the business of the licensee is not income from property. Cognizance must be taken of the real purposes for which, and the sources from which, the moneys were received by the appellant (*Munro* v. *Commissioner of Stamp Duties* (1)). The words of par. (*c*) are neither clear nor definite enough to include the moneys received from bookmakers (*Universal Film Manufacturing Co. (Australasia) Ltd.* v. *New South Wales* (2) ; *Munro* v. *Commissioner of Stamp Duties* (1)). That paragraph was included for the express purpose of affecting the income of companies, and, in respect to that income to introduce the distinction of income arising from personal exertion and income arising from property. Everything which comes within the category of property is caught up by the words used in pars. (*a*) and (*b*). The appellant's right to receive these moneys depends upon the continuance by it of the conduct of race meetings. Those moneys are not payment for the use of the land. The moneys received by the appellant in respect to catering rights also are moneys received *ex contractu*. The appellant on its part has to

(1) (1934) A.C. 61, at p. 68 ; 34 S.R. (N.S.W.) 1, at p. 7.
(2) (1927) 40 C.L.R. 333, at pp. 345, 346.

hold, and to incur the expense of holding race meetings; therefore these moneys come within the category of "income from personal exertion." A grant of catering rights is not a conveyance of property (*Commissioner of Stamp Duties (N.S.W.)* v. *Yeend* (1)). The use of the land is incidental. The holding of race meetings, which is a condition precedent, necessitates personal exertion on the part of the appellant. The training and other fees upon which the special tax is sought to be imposed were received by the appellant in respect to features which are inseparable from the business of conducting a racecourse, and are just as much income from personal exertion as income received from the business of, say, conducting swimming baths, or a billiard saloon.

Sir *Thomas Bavin* K.C. (with him *Roper*), for the respondent. The effect of sec. 5 (1) (*c*) of the *Income Tax Act* 1931, is that all income is subject to the special tax unless it falls within the definition of income from personal exertion, and, also, is not of a class that if the source from which it is derived were carried on apart from the taxpayer's business it would be income from property. The fact that the arrangement between the appellant and the bookmakers imposes obligations on both parties does not determine in any way the question whether the money received thereunder by the appellant is income from property or personal exertion. Regard must be had to the real purpose for which the money is paid. It is paid by the bookmakers for the right to go on to the appellant's land, and to carry on their vocation on a definite part of that land. The facts that the bookmakers do not always occupy the same part of the land; that no property vests in them; and that moneys paid by them cannot be classed as rent, are immaterial. Bookmakers are necessary adjuncts to the business of racing, and for the purpose of carrying on their business they are given a licence to occupy a part of the appellant's land at a particular time. Money received by the appellant in those circumstances comes exactly within the provisions of par. (*c*).

[DIXON J. referred to *Fry* v. *Salisbury House Estate Ltd.* (2).

[EVATT J. referred to *Lord Glanely* v. *Wightman* (3).]

(1) (1929) 43 C.L.R. 235. (2) (1930) A.C. 432.
(3) (1933) A.C. 618.

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The effect of statutory provisions similar to those contained in par. (*c*) was dealt with in *Adelaide Fruit and Produce Exchange Ltd.* v. *Deputy Commissioner of Taxation* (*S.A.*) (1). It is obvious that moneys paid by bookmakers for the right to go upon a racecourse to carry on their business, and money paid by a person for the right to see races thereon come within different categories. The bookmakers pay for the use of the appellant's property in order to carry on their business on that property. There is not any difference between income derived under a lease and income derived under a licence from day to day. Income so derived is not derived by personal exertion; therefore it must be income from property and within the operation of par. (*c*). This is supported by the fact that licence moneys are paid by the bookmakers to the appellant in respect to occasions when the race meetings are conducted on the course by organizations other than the appellant (see *Thomas* v. *Federal Commissioner of Taxation* (2)). " Income from property " includes all income which is not derived as the result of personal exertion. Catering fees are paid for the right to the exclusive use of a particular part of the appellant's land, which part does not vary as to position; therefore those fees are income from property. *Yeend's Case* (3) is distinguishable. The right of exclusive possession was not granted in the agreement under consideration in that case, as here. The catering business can be carried on apart from the business of racing. Training fees are not paid in respect to personal services rendered by the appellant. Registration fees have the same characteristics as the moneys received from bookmakers.

E. M. Mitchell K.C., in reply. The substance of the various transactions now before the Court must be ascertained (*Munro* v. *Commissioner of Stamp Duties* (4)). The decision in *Adelaide Fruit and Produce Exchange Ltd.* v. *Deputy Commissioner of Taxation* (*S.A.*) (1) rested upon facts peculiar to that case. The test is: Could these particular items be earned if the business ceased? As regards the catering rights there is not any question of rent or licence money, and the appellant is not entitled to any money unless race meetings

(1) (1932) S.A.S.R. 116; 2 A.T.D. 1.
(2) (1923) 33 C.L.R. 256, at p. 264.
(3) (1929) 43 C.L.R. 235.
(4) (1934) A.C. 61; 34 S.R. (N.S.W.) 1.

are held. Moneys derived from these sources are not income from property (*Daly* v. *Edwardes* (1); *Edwardes* v. *Barrington* (2); and *King* v. *David Allen & Sons Billposting Ltd.* (3)). The essential features present in this case were present in *Yeend's Case* (4). See also *Carlisle and Silloth Golf Club* v. *Smith* (5), and *Lord Glanely* v. *Wightman* (6).

Cur. adv. vult.

The following written judgments were delivered :—

GAVAN DUFFY C.J., EVATT AND MCTIERNAN JJ. Sec. 5 (1) of the *Income Tax Act* 1931, provides that, in addition to income tax otherwise payable, there shall be payable a further income tax of ten per cent of the amount of the taxable income derived by any person from three specified sources. The first source is property. The second is by way of interest, dividends, rents or royalties ; and the third source, with which we are concerned in this appeal, is "in the course of carrying on a business, where the income is of such a class that, if derived otherwise than in the course of carrying on a business, it would be income from property." In our opinion, sec. 5 (1) (*c*) refers to a class of business income. It is the class made up of those items of business receipts which, but for their association in fact with the business activities of the taxpayer, would be properly regarded as income from property. In the case of any disputed item of such business income, the Court is therefore required to dissociate the item from the particular business of the taxpayer, in order to ascertain the class to which the item is to be referred for the purpose of the sub-paragraph. If such dissociation is not reasonably possible or practicable, we think that the sub-paragraph does not operate at all. If it is reasonably possible or practicable, the Court must assume such dissociation, and then determine whether the item in dispute would be income from property.

Applying these principles to the present case, our opinion is as follows :—(A) The bookmaker's fees are items of the taxpayer's

(1) (1900) 83 L.T. 548.
(2) (1901) 85 L.T. 650.
(3) (1916) 2 A.C. 54 ; 114 L.T. 762.
(4) (1929) 43 C.L.R. 235.
(5) (1913) 3 K.B. 75.
(6) (1933) A.C., at p. 641.

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business receipts which cannot reasonably or practicably be treated as severed from the taxpayer's business of conducting race meetings. The fees are collected, not by the taxpayer, but by an association to which the taxpayer belongs. It is true that the taxpayer allots a suitable position within a betting-ring to individual bookmakers, but the case suggests that the bookmaker makes no claim to occupy any particular position in the betting-ring. In other words, the licence or permit which the bookmaker obtains to carry on his business is so closely associated with the taxpayer's business activities, and so little associated with the taxpayer's occupation of the racecourse that sec. 5 (1) (*c*) does not apply to the items of income so received.

(B) The receipts in respect of catering rights belong, in our opinion, to a different category. The successful tenderer for such rights obtains the right of using the liquor bars and soft drinks kiosk, forming part of the company's land and premises. Such right is described in the contract as "the exclusive right of all those the rooms and appurtenances known as the liquor bars and soft drinks kiosk forming portion of the Company's premises situate at Zetland in the State of New South Wales in the Grand Stand Saddling Paddock and Leger Reserve respectively for Race and Trotting Meetings of the said Company to be held from January 1st to December 31st 1930 at the fee and subject to the terms and conditions hereinafter mentioned." The precise nature of the tenderer's occupancy was discussed in argument, but it is sufficient to say that the income received in respect of the use of the land and premises by the successful tenderer can be dissociated from the conduct of the taxpayer's business. Indeed, it is quite reasonable to suppose cases in which the power to confer such rights of catering would be in the hands of persons other than those conducting the race meetings themselves. The moneys paid for the enjoyment of this right, unlike those paid by the bookmakers, are income of a class which the taxpayer might receive as owner of the land if it were not an entrepreneur of horseracing. When dissociation from business activities is made, as the sub-paragraph requires, the income receipts stand revealed as income derived from the exclusive right of using portion of the land and premises upon certain occasions throughout the year. Although the motive for such use by the caterer is to

attract the custom of the racegoers, the items of income so derived appear to us to be properly regarded as income from property.

(c) The training-fees are fees collected by the appellant from horse trainers or owners for permitting them to train the horses on the appellant's racecourse on days other than race days. Such items of income can be dissociated from the appellant's business of conducting race meetings, and are more closely related to the appellant's ownership of property. If the dissociation is made as the sub-paragraph requires, the income would be income from property.

In our opinion, the case stated should be answered as follows:— (1) As to the items of revenue referred to in pars. 11 (*a*) and 11 (*d*): Yes. As to the items of revenue referred to in pars. 11 (*b*) and 11 (*c*): No. (2) As to the items of revenue referred to in pars. 11 (*a*) and 11 (*d*): No. As to the items of revenue referred to in pars. 11 (*b*) and 11 (*c*): Yes.

RICH J. I have read the judgment of my brother *Dixon* and agree with it. I answer the questions submitted: (1) Yes; (2) No.

STARKE J. Case stated for the opinion of this Court pursuant to the provisions of the *Income Tax Assessment Act* 1922-1931. The facts are fully set out in the case, but they may be summarized as follows:—The appellant is a racecourse proprietor, and conducts race meetings at Victoria Park. It is also a member of an association called "The Associated Racing Clubs." This association regulates and controls horse and pony racing on the courses of its members. It regulates, amongst other matters, the registration of bookmakers and their clerks, the licensing of bookmakers to conduct the business of bookmaking on the courses of its members, and the fees to be paid in respect of such registration and licensing. It pays to the appellant one-fourth of the net fees which it receives from these sources. The appellant allots and regulates the positions on its racecourse which the licensed bookmakers may use in the conduct of their betting operations. Further, the appellant grants the right of selling refreshments—catering rights—on its racecourse to various tenderers, in consideration of certain sums paid by the tenderers to it. It grants the tenderers the exclusive right of using refreshment rooms and

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liquor bars on race days during the period of the arrangement, bnt retains extensive powers of supervision and control. The appellant has constructed training tracks on its racecourse. It permits owners and trainers of horses to use these tracks for the purpose of training their horses, and charges them fees for using the tracks.

The Commissioner has assessed the appellant to "further income tax" under the Federal *Income Tax Act* 1931, No. 24, sec. 5, in respect of income received by it from the registration and licensing of bookmakers, the catering rights, and the training tracks, after allowing certain deductions which are not in contest here. The question is whether he was right in so doing, and that depends upon the construction of the section. It provides: "(1) In addition to any income tax payable under the preceding provisions of this Act, there shall be payable upon the taxable income derived by any person—(*a*) from property; (*b*) by way of interest, dividends, rents or royalties, whether derived from personal exertion or from property; and (*c*) in the course of carrying on a business, where the income is of such a class that, if derived otherwise than in the course of carrying on a business, it would be income from property, a further income tax of ten per centum of the amount of that taxable income."

Admittedly, apart from this section, the income in question here would have fallen within the description of income from personal exertion, for it is the proceeds of a business carried on by the appellant. (See *Income Tax Assessment Act* 1922-1934, sec. 4, "Income from personal exertion.") But the object of sec. 5 of the Act No. 24 of 1931 is to enlarge the definition of "income from property" which under the *Income Tax Assessment Act* 1922-1934, sec. 4, means "all income not derived from personal exertion." "Income from personal exertion" does not include interest, unless the taxpayer's principal business consists of lending money, and does not include rents and dividends (*Income Tax Assessment Act* 1922-1934, sec. 4). But sec. 5 of the Act No. 24 of 1931 includes, for the purposes of that section, interest in cases in which the taxpayer's principal business consists of lending money. The provisions of sec. 5 (1) (*a*) and (*b*) are, however, inapplicable to the facts of this

case, so we come to sec. 5 (1) (*c*), which is the provision relied upon by the Commissioner.

The income was derived in the course of carrying on a business But is it of such a class that if derived otherwise than in the course of carrying on a business it would be income from property? Segregate the items assessed from the business, says the Commissioner, and then ascertain whether they are not of a class that would be income from property. All income that is not income from personal exertion must be income from property, and subject to the special tax. But whether the income is income from personal exertion or income from property must depend upon its essential characteristics. In the Commissioner's view, the essential characteristic of the income in question here is that it is derived from land, from the right to go upon the appellant's land or racecourse and conduct operations there. But in my opinion the real characteristic of the income is that it is derived from permission to carry on certain callings or operations in conjunction with the appellant's undertakings or race meetings, and in substance is not a payment for the use of the appellant's land or racecourse.

The questions should be answered: (1) Yes; (2) No.

DIXON J. The questions for our decision arise under par. (*c*) of sub-sec. 1 of sec. 5 of the *Income Tax Act* 1931. Sec. 5 (1) is as follows:—"In addition to any income tax payable under the preceding provisions of this Act, there shall be payable upon the taxable income derived by any person—(*a*) from property; (*b*) by way of interest, dividends, rents or royalties, whether derived from personal exertion or from property; and (*c*) in the course of carrying on a business, where the income is of such a class that, if derived otherwise than in the course of carrying on a business, it would be income from property, a further income tax of ten per centum of the amount of that taxable income."

This provision contains many difficulties. The first to present itself is in the expression "taxable income." By sec. 4 of the *Income Tax Assessment Act* 1922-1931 which is incorporated and to be read as one with the *Income Tax Act* 1931 (see sec. 2) the words "taxable income" mean the amount of income remaining after all

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deductions allowed by the *Income Tax Assessment Act* have been made. It is difficult to believe that in sec. 5 (1) the expression should be given this meaning. It appears to refer to that part of the taxable income which is attributable to the sources described in pars. (*a*), (*b*) and (*c*). But as it most certainly refers to net income and not gross, a question at once arises how the total deductions made from the total assessable income are to be allocated or distributed in arriving at the net income which should be attributed to these sources. By sec. 23 (2) of the *Income Tax Assessment Act* directions are given for the solution of the similar but by no means identical question which arises in the discrimination between tax upon income derived by individuals from property and tax upon income derived by them from personal exertion. But no directions are given which apply to sec. 5 (1) (*b*) and (*c*) of the *Income Tax Act.* Probably in cases falling under par. (*a*) of sec. 5 (1) the provisions of sec. 23 (2) of the *Income Tax Assessment Act* do apply. But, as to the rest, apparently for such items of expenditure as are not by their very character connected with income, some method of apportionment must be adopted. Fortunately in the present case the taxpayer has accepted the method which the Commissioner has applied in allocating disbursements. But, if the words " taxable income " are not to receive their defined meaning, ought it not to follow that the words following " taxable," namely " income derived by any person from property " should be treated as a compound expression possessing its defined meaning ? This expression is defined by sec. 4 of the *Income Tax Assessment Act* to mean all income not derived from personal exertion. Except for what par. (*b*) contains, there is no reason why the expression should not be so understood. Par. (*b*) expressly includes interest, dividends and rents. But, by the definition of income from personal exertion in sec. 4 of the *Income Tax Assessment Act*, that category does not include interest unless the taxpayer's principal business consists of the lending of money and does not include rents and dividends. These forms of income are accordingly income from property. To apply the statutory meaning, therefore, involves a duplication in the inclusion in par. (*b*) of dividends, rents and all interest. But redundancies are not uncommon in a statute. This duplication

does not appear to me to be sufficient ground for excluding the application of the statutory definition of income from property. The result is that all that par. (*b*) adds to what is already contained in par. (*a*) is interest when the taxpayer's principal business consists of the lending of money and royalties. Moreover, income from royalties will seldom be income from personal exertion unless they are derived as the result of some activity which has many, if not all, of the characteristics of business. It is difficult, therefore, to see what par. (*b*) achieves. For so much of what it deals with as does not fall under par. (*a*) would almost certainly fall under par. (*c*) which relates to income derived in the course of carrying on a business. It does, however, help to illustrate the meaning of the vague language in which par. (*c*) is expressed. Par. (*b*) enumerates kinds of revenue which ordinarily arise from property, but which nevertheless are capable of being so earned that they form part of a taxpayer's income from personal exertion. They are, prima facie, income from property, because they flow from a fund. In the case of interest, the fund is invested on loan, in the case of dividends, it is invested in shares, in the case of rent, in land, and in the case of royalties in some other form of property, e.g. mines. These sources of income usually involve no substantial exertion by the taxpayer. But if he acquires the sources of income as part of an organized and systematic series of operations which he carries on as a business, as, for instance, the money lender or the stock and station agent derives interest, the taxpayer's exertions constitute a further source constituting the real cause of the derivation of the income which forms only part of the proceeds of his enterprise. Par. (*c*) of sec. 5 (1) appears to be framed as a general clause to bring all such income under the special tax which the section imposes. It describes the income to which it refers by two characteristics. First, it must be derived in the course of carrying on a business. Next, it must be of such a class that, if not so derived, it would be income from property. Now all income not derived from personal exertion is income from property, and, therefore, if any income actually derived from carrying on a business were conceived as income derived by the taxpayer but yet not derived from carrying on a business it would then fall within the class of income from property. But it is obvious that the

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paragraph does not mean to impose the special tax on all income from business, and, doubtless, it is for this reason that it introduces the conception of a class of income. It must be "income of such a class" that it would be income from property were it not for the fact that it is derived in the course of carrying on a business. The classification of the income is, therefore, the essence of the application of the provision. The paragraph does not demand the hypothesis that income is derived from property although its only source is carrying on a business. It is dealing with classes of income having defined characteristics. The income must be of a class which has a prima facie source taking it within the definition of income from property. When income of such a class is actually derived by a given taxpayer in the course of his business, then, although in his case he has obtained it by his exertions and not merely by his possession of its prima facie source, yet it is to be specially taxed like income from property. In my opinion the meaning of par. (*c*) would not be altered if it were expressed—"income derived by any person in the course of carrying on a business, if the income is of such a class that, when it is derived otherwise than in the course of carrying on a business, it is income from property."

The business of the taxpayer in the present case is that of conducting race meetings. In the course of that business it received income from fees, from bookmakers and their clerks, from contracts conferring catering rights and from fees payable by trainers and owners for the use of training tracks. The Commissioner has included all these receipts in the income upon which the special tax is imposed. He has done so on the footing that they are really payments made for the use of the land, and for this reason should be regarded as a class of income which, if not derived in the course of carrying on the racing business, would be income from property. In my opinion this view is erroneous.

The bookmakers' fees and those of their clerks are paid to an association formed by the taxpayer and three other racing bodies. The association licenses the bookmakers and together with the constituent bodies controls their conduct in carrying on their vocation. It distributes the net proceeds of the fees in four equal shares. The bookmaker does not pay for the use of the land as such.

He pays in order that he may be allowed to ply his calling in connexion with the business carried on by the taxpayer and the associated bodies. The caterers differ from the bookmakers in having allotted to them a specific part of the taxpayer's premises which, no doubt, is arranged and fitted for the convenient supply of refreshments. But they obtain no exclusive occupation of this defined area. They are mere licensees. Moreover, they operate under a special executory contract requiring them to supply refreshments to the racegoers. The payment they make is not simply a consideration for the use of the premises. It is made in exchange for the opportunity of carrying on a business with the persons whom the taxpayer's enterprise brings to the course.

The use of the training tracks presents features which bring the revenue so produced more nearly within the provision. But the taxpayer provides the services of men who maintain the tracks and supervise the operations of those training horses so that they may be conducted without intrusion or disorder. The course is chosen as the training ground because it is the racecourse. The charges made are intimately connected with the business of racing conducted by the taxpayer and it is, in my opinion, wrong to consider them as belonging to a class of revenue which might be derived otherwise than in the course of conducting the undertaking.

For these reasons I think the questions in the special case should be answered: (1) Yes; (2) No.

Case stated answered as follows:—(1) *As to the items of revenue referred to in pars.* 11 (*a*) *and* 11 (*d*): *Yes. As to the items of revenue referred to in pars* 11 (*b*) *and* 11 (*c*): *No.* (2) *As to the items of revenue referred to in pars.* 11 (*a*) *and* 11 (*d*): *No. As to the items of revenue referred to in pars.* 11 (*b*) *and* 11 (*c*): *Yes.*

Solicitor for the appellant, *W. W. Robinson.*

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

J. B.