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O'Connor J.

and has described the power of disposition in ordinary language, which must, therefore, be interpreted according to the ordinary meaning of the words used. Nor can I see any reason why the legislature should have drawn the distinction suggested. No doubt, the power is larger where the right of disposition is operative in the testator's lifetime, as well as after his death. But succession duty is only concerned with the state of the property after his death, and as regards that period, there is no difference between the power of disposition by deed or by will, or by will only. For these reasons, I am of opinion that the words of the section are to be construed in their ordinary sense, and construed in that sense, they impose a duty upon the property in question. I therefore agree that the appeal must be upheld.

*Appeal allowed. Question answered accordingly.*

Solicitor, for appellant, *Guinness*, Crown Solicitor for Victoria.

Solicitors, for respondent, *Hedderwick, Fookes & Hedderwick*, Melbourne.

B. L.

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[HIGH COURT OF AUSTRALIA.]

DUKE OF WELLINGTON GOLD MINING COMPANY NO LIABILITY . . DEFENDANTS, } APPELLANTS:

AND

ARMSTRONG . . . . . PLAINTIFF, RESPONDENT.

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MELBOURNE, *June*, 5, 6, 7, 8, 11.

Griffith C.J., Barton and O'Connor JJ.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

*Mining on private property—Compensation—Purchase money—Agreement between applicant for lease and land-owner—Transfer of application—How far agreement binding on transferee—Royalty—Effect of surrender of lease—Mines Act* 1897 (*Vict.*) (*No.* 1514), *secs.* 29, 73-79, 98, 112—*Mines Act* 1904 (*Vict.*) (*No.* 1961), *sec.* 37.

An applicant for a gold mining lease on private land may, under sec. 75 of the *Mines Act* 1897, agree with the owner of such land for the payment of any sum to be ascertained in any way mutually agreed upon for purchase money or compensation, and when the payment is to be made by future instalments, it is in the nature of rent.

Such payment may be estimated by way of a percentage of the value of the gold that may thereafter be won from the mine.

Such an agreement, so far as it is to be performed in future, runs with the land, and, where the applicant has, pursuant to sec. 112 of the *Mines Act* 1897, transferred his interest in the application, the agreement is binding on the transferee.

The rights of the owner of the land under such an agreement are not prejudiced by a surrender of the lease and an acceptance of a new lease from the Crown.

Decision of *Madden* C.J. (*Armstrong* v. *Duke of Wellington Gold Mining Co. No Liability*, (1906) V.L.R., 145 ; 27 A.L.T., 146), affirmed.

APPEAL from the Supreme Court of Victoria.

On 10th January 1901 one John Morton applied under the *Mines Acts* 1890 and 1897 for a gold mining lease of about 30 acres of land portion of 88 acres belonging to the plaintiff, John Armstrong, under a Crown grant to him of 26th November 1896, of which one McColl was in possession as tenant.

On 13th April 1901 Morton entered into an agreement in writing with the plaintiff the material parts of which were as follow :—

"Whereas John Morton of Melbourne in the State of Victoria financial agent has applied under the *Mines Act* 1890 Part II. for a mining lease of certain land . . . . of which said land John Armstrong of Nattie Yalloak in the said State is the owner And whereas the said John Armstrong has claimed compensation under the said Act and it has been and is hereby mutually agreed and determined between the said John Morton and the said John Armstrong as follows :—That the amount of compensation to be paid to the said John Armstrong under the said Act for damages shall be the sum of Twenty-five pounds for Five acres of the surface of the said land owned as aforesaid to be taken and occupied by the said John Morton for the purpose of making or sinking from the surface of the said land such shaft or shafts as may be

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deemed necessary or requisite for the purpose of carrying on and prosecuting mining operations and the sum of Five pounds for every additional acre or fractional part of an acre of the surface of the said land taken and occupied by the said John Morton for machinery sludge trams or railways and other purposes requisite to meet mining requirements or operations such compensation to be paid before entering on the said land for the purpose of sinking such shaft as aforesaid or immediately on such land being so taken or occupied as aforesaid and to be exclusive of damage done to any standing crop such damage to be paid immediately on such crop being so damaged And a royalty of Three per centum of the gross yield of gold won in and hereafter obtained from the said land That the said John Armstrong doth hereby give and grant permission to the said John Morton his heirs administrators executors and assigns to take possession of the said piece of land for mining purposes for the term of Fifteen years from the date hereof and consents to the application of the said John Morton for the said gold mining lease under the provisions of the *Mines Act* 1890 Part II. And the said John Morton doth hereby for himself and his executors and administrators covenant with the said John Armstrong his heirs executors administrators and assigns in manner following that is to say That the said John Morton his heirs executors and administrators will pay to the said John Armstrong his executors administrators or assigns the said sums of money hereinbefore reserved and made payable at the times aforesaid without any deduction and also will pay to the said John Armstrong his executors administrators or assigns a royalty or percentage equal to Three per centum of the gross yield of gold obtained out or from the said land or any part thereof and also will pay compensation for all crops injured by mining operations and will pay such royalty from time to time as and when the said gold shall be sold such payments of the said royalty or percentage to be free from all deduction whatsoever . . . ."

This agreement was executed in triplicate and one original part thereof was forwarded to the Minister of Mines pursuant to sec. 78 of the *Mines Act* 1897.

The Duke of Wellington Gold Mining Company No Liability, the defendants, were registered under Part II. of the *Companies*

*Act* 1890 on 11th May 1901, and on 26th June 1901 Morton for valuable consideration transferred to them all his right and title in the application for such mining lease. The company entered into possession of the land the subject of the application on 11th May 1901, began mining operations thereon, and continued to do so. On 21st October 1901 a gold-mining lease, No. 4,968, was duly issued to the company.

By statement of account headed "The Duke of Wellington G.M. Co. N.L., Dr. to John Armstrong," the defendants acknowledged themselves indebted to the plaintiff for a royalty of 3 per cent. of the gold which they had up to that time obtained from the land, and sent him their cheque for £7 9s. 8d. in payment thereof. From that time up to the 6th March 1905 the defendants regularly in the same form stated their indebtedness to the plaintiff for 3 per cent. royalty of all the gold they won, and paid it to the plaintiff. During that time many other acts were done by the defendants, which appeared to assume that they were bound by the agreement of 13th April 1901.

On 11th March 1904 the defendants surrendered to the Crown lease No. 4,968 and another lease No. 5,112 which they held over a road adjoining lease No. 4,968, conditionally on a new lease being granted in lieu thereof for a further term of 15 years to comprise the aggregate areas of the two leases. This was approved by the Minister on 14th March 1905.

On 30th March 1905 the defendants served the plaintiff with a summons to go before the Warden on 7th April 1905 to have compensation assessed on an application for the issue of gold mining lease No. 6,039, Ballarat, formerly gold mining leases No. 4,968 and No. 5,112, Ballarat.

On the hearing of the summons the plaintiff protested in writing against the jurisdiction of the Warden, but evidence was heard, and the Warden held that the plaintiff had already received full compensation, and was not entitled to anything further, but he awarded to Robert Deans, a tenant of part of the land, £3.

On 30th May 1905 lease No. 6039 was issued by the Crown to the defendants consolidating the areas of the former leases Nos. 4,968 and 5,112.

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The plaintiff then brought an action against the defendants claiming an account of all gold obtained by them out of or from the land, payment of 3 per centum thereon pursuant to the agreement of 13th April 1901, and damages for breach of that agreement.

The action was heard by *Madden* C.J., who gave judgment for the plaintiff with costs, ordering the defendants to account for all gold obtained by them out of or from the land referred to in the agreement of 13th April 1901, and to pay to the plaintiff 3 per cent. of the gross value of such gold after crediting to the defendants all sums already paid by them for or in respect of such 3 per cent. (*Armstrong* v. *Duke of Wellington Gold Mining Co. No. Liability*) (1).

From this decision the defendants appealed to the High Court.

*Isaacs* A.G. and *Starke*, for the defendants appellants. The only possible subject of agreement between the applicant for a mining lease and the owner of the land under sec. 75 of the *Mines Act* 1897 is compensation within the meaning of the Act, and an agreement for a royalty is not within that section. An agreement for payment for royalty is illegal. Sec. 76 says that the compensation "shall be" &c., and sec. 77 provides that if the parties cannot agree as to the amount of compensation, the warden is to decide the matter, showing that the compensation as to which the parties are to agree is something which the warden may award as compensation, and a royalty is not a thing he can award. The amount of gold to be afterwards won cannot be a measure of the surface damage. But it is not necessary to go so far. It is sufficient to say that an agreement for a royalty is not within the Act, and the respondent must establish its validity and that it is binding on the appellants outside the Act. A transfer under sec. 112 of an application for a mining lease does not have the result that the appellants are bound by the agreement made between the transferror and the respondent. The benefit of that agreement is not part of the transferror's "interest in his application." The respondent can only rely on that agreement if he can prove a common law novation, and there is none proved.

(1) (1906) V.L.R., 145; 27 A.L.T., 146.

So far from there being a novation, both parties thought they were bound by the original agreement. See *North Sydney Investment and Tramway Co.* v. *Higgins* (1); *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (2); *Natal Land Colonization Co.* v. *Pauline Colliery Syndicate Ltd.* (3).

The covenant as to the payment of royalty is not one which would run with the land, and therefore the appellants are not bound by it: *Randall* v. *Rigby* (4); *Austerberry* v. *Corporation of Oldham* (5); *Keppell* v. *Bailey* (6); *Tulk* v. *Moxhay* (7); *Haywood* v. *Brunswick Permanent Benefit Building Society* (8) There might be a lien over the land in a case of this kind: *Walker* v. *Ware, Hadham and Buntingford Railway Co.* (9). Assuming that there were a lien, the only remedy would be to have the land sold. That would exclude this action. But the payment is taken in such a way as to exclude a lien: *In re Brentwood Brick and Coal Co.* (10). If there was a lien there should have been an assignment of the term by a proper grant in order to make the appellants liable: *Foa's Landlord and Tenant*, p. 372. So far as the agreement is concerned the appellants are not bound. They were trespassers from the beginning, both parties thinking they were bound by the agreement. If there was a novation, that is, a new agreement, it was never registered as required by the Act. So that the only question remaining is whether the agreement was assigned by the Act.

The agreement, if it is assigned by the Act, only subsists during the continuance of the original lease, and came to an end on its surrender. The agreement which the Act contemplates is to be in relation to a particular application, and a particular lease. If the lease were forfeited the agreement would end. So it ends also on a surrender of the lease. The agreement must be an incident of the lease in order that the appellants shall be bound by it, and being an incident of the lease it falls with the lease. The obligation of the assignee can only arise out of privity of estate. When the lease is terminated the privity of estate ceases,

(1) (1899) A.C., 263.
(2) (1902) 1 Ch., 146.
(3) (1904) A.C., 120.
(4) 4 M. & W., 130.
(5) 29 Ch. D., 750.
(6) 2 My. & K., 517.
(7) 2 Ph., 774.
(8) 8 Q.B.D., 403.
(9) L.R. 1 Eq., 195.
(10) 4 Ch. D., 562.

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and so must the liability of the assignee. Some new liability must then be shown to have arisen under the new lease issued after the surrender, and sec. 29 does not give rise to such a new liability.

[They also referred to the *Mines Act* 1897, secs. 68, 69, 73, 74, 93; *Land Act* 1865, sec. 42; *Land Act* 1869, sec. 49; *Mines Act* 1865; *Mining on Private Property Act* 1884, secs. 16, 32; *Land Act* 1884, secs. 65, 115; *Mines Act* 1890, sec. 380; *Hutchison* v. *Scott* (1); *Seton on Decrees*, 6th ed., p. 2293; *Beckett* v. *Tower Assets Co.* (2); *Piggott* v. *Stratton* (3).]

*Mitchell* K.C. (*Irvine* and *Schutt* with him), for the respondent. There is no reason why the parties should not agree that compensation should be paid partly by a percentage of the gold recovered.

[GRIFFITH C.J.—We do not wish to hear you on that point.]

Under sec. 112 of the *Mines Act* 1897, by the transfer of the application, the burden and benefit of a prior agreement between the original applicant and the landowner, passes to the transferee. The Act contemplates only one agreement in writing between the applicant and the landowner, and when that is effected, there is no provision for, and the Act does not contemplate, a subsequent agreement or an assessment by the warden as to anything comprised in the original agreement. The warden gets no jurisdiction under sec. 77 to assess compensation or purchase money if in fact an agreement has been made within ten days after the survey. If the agreement were not transferred with the application the transferee would be at the mercy of the landowner, because the warden would have no jurisdiction.

[GRIFFITH C.J.—It seems clear that the appellants could sue the respondent on the agreement.]

If so the respondent can sue the appellants. The provision in sec. 75 that the agreement is to be in writing, is for the benefit of the landowner, and may be waived by him: *Gardner* v. *Büttner* (4). The words "purchase money" in sec. 112 and other sections are not used in the ordinary sense as indicating an acquirement

(1) 3 C.L.R., 359.
(2) (1891) 1 Q.B., 1.
(3) 1 De G. F. & J., 33.
(4) 27 V.L.R., 106; 22 A.L.T., 232.

of the fee simple, but mean payment in respect of the land actually taken and used by the lessee during the term of the lease. That is shown by sec. 91. The agreement, however, says that the royalty is to be in respect of the compensation to which the landowner is entitled under the Act, whatever it may be. There is ample evidence of novation here.

[GRIFFITH C.J.—Where a contract is required by law to be in writing can there be a novation of that contract not in writing? *Lawford* v. *Billericay Rural District Council* (1).]

Yes.

[*Isaacs* K.C. referred to *Young & Co.* v. *Mayor, &c. of Royal Leamington Spa* (2).]

[GRIFFITH C.J.—However, if there is a contract by novation it is between the lessee and the landowner, and may not be within sec. 75, which requires an agreement between an applicant and the landowner to be in writing.]

The agreement is in the nature of a lease and therefore the case would come within *Hutchinson* v. *Scott* (3). As to novation, see *Howard* v. *Patent Ivory Manufacturing Co.* (4), in which *In re Northumberland Avenue Hotel Co.* (5) was distinguished, and *Werderman* v. *Société Générale d'Electricité* (6). The surrender of the lease did not terminate the agreement which was intended to continue while the appellants continued mining operations. The surrender by the appellants to the Crown cannot affect the rights of third parties: *London and Westminster Loan and Discount Co.* v. *Drake* (7). See also sec. 37 of the *Mines Act* 1904.

[He also referred to *Piggott* v. *Stratton* (8); *Saint* v. *Pilley* (9); *Mackay* v. *Dick* (10).

*Isaacs* A.G. in reply, referred to *Woolley* v. *Attorney-General for Victoria* (11); *The Case of Mines* (12); *Chitty's Prerogative*, p. 146; *Comyn's Digest*, "*Waifs*," 336, 337A; *Lyddall* v. *Weston*

(1) (1903) 1 K.B., 772.
(2) 8 App. Cas., 517.
(3) 3 C.L.R., 359.
(4) 38 Ch. D., 156.
(5) 33 Ch. D., 16.
(6) 19 Ch. D., 246.
(7) 6 C.B.N.S., 798.
(8) 1 De G. F. & J., 33.
(9) L.R. 10 Ex., 137.
(10) 6 App. Cas., 251 at p. 263.
(11) 2 App. Cas., 163.
(12) 1 Plow., 310.

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(1); *Dart on Vendors and Purchasers*, 7th ed., p. 777; *Spicer* v. *Martin* (2).

*Cur. adv. vult.*

GRIFFITH C.J. In this case the plaintiff is the freeholder of a certain piece of land in the country. The defendants were the holders of a mining lease granted on 21st October 1901, for a term ending on 12th April 1916, of 30 acres of the plaintiff's land. Before the lease was granted one Morton had made an application in the form required by the *Mines Act* 1897, for a mining lease of the 30 acres, and on 13th April 1901, he had entered into an agreement with the plaintiff for compensation to be paid to the plaintiff in respect of mining operations to be carried on. The agreement was expressed to be for "the amount of compensation to be paid to the said John Armstrong under the said Act" (the *Mines Act* 1890) "for damages," and it was to be the sum of £25 for five acres of the surface to be taken and occupied for certain mining purposes, £5 for every additional acre or fractional part of an acre of the surface taken and occupied for mining purposes, exclusive of damage to standing crops, and a royalty of 3 per cent. of the gross yield of gold which might thereafter be obtained from the land.

On 26th June 1901, the application was, in conformity with the Mining Acts, transferred by Morton to the defendant company, and they thereupon carried on mining operations, and, until the year 1905, observed the terms of the agreement made between Morton and the plaintiff. In March 1905, the defendants surrendered the lease of 21st October 1901, and obtained a new lease for a term ending on 13th March 1919, and thereupon they refused any further to perform the agreement made between Morton and the plaintiff. The plaintiff then brought this action claiming that the defendants are liable to perform the terms of that agreement. The defendants set up several defences, three only of which have been argued before us. The first is that the agreement between Morton and the plaintiff was never binding on the defendants at all. The second is that, if any of the terms were binding upon them, they were only binding so far as they

(1) 2 A.L.R., 19.

(2) 14 App. Cas., 2, at p. 23.

related to compensation for surface damage, and, further, that the stipulation as to royalty or percentage of gold won was contrary to law, being prohibited by the law of Victoria. The third defence set up was that upon the surrender of the lease the defendants' obligation, if any, under the agreement ceased.

In order to deal with these defences it is necessary to consider the scheme of the *Mines Act* 1897, which, so far as it relates to mining on private property, was in effect a consolidation and re-enactment with some alterations of the earlier law.

The question of mining on private lands is dealt with specifically in Part II. of the Act, which forms practically a code. The ruling principle is laid down in sec. 68 (1), which provides that "gold and silver whether on or below the surface of all land whatsoever in Victoria whether alienated or not alienated from the Crown, and if alienated whensoever alienated, are and shall be and remain the property of the Crown." That is really a declaratory provision, because it was decided in *The Case of Mines* (1) in the time of Elizabeth that such was the law of England, and it has frequently been held to be the law in Australia.

The scheme of the Act, then, is this:—The gold in private land belongs to the Crown; the surface belongs to the freeholder. (It is not necessary to refer to persons who are not freeholders, because the plaintiff was the freeholder.) In order, therefore, to facilitate mining for gold on private land, which had been recognized by the legislature to be a desirable thing to do, it was necessary to provide that a person desiring to mine should obtain title from the owner of the freehold as owner of the surface, and from the Crown as owner of the gold. If the Act is examined it will be seen that there is a careful and elaborate scheme enabling a lessee to obtain title from both owners, and for the protection of the rights of both owners. I refer first to sec. 73, which provides that any holder of a miner's right who desires to obtain possession of as a claim, or any person who desires to obtain a lease of, any private land, may enter on the land for the purpose of marking out any portion thereof of which he desires to take possession by virtue of a miner's right or under the regulations. In the same section (sub-sec. 5) there is a

(1) 1 Plow, 310.

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provision that certain classes of land shall not be taken possession of by virtue of a miner's right, except under certain conditions. It is obvious that for the purpose of mining it may or may not be necessary to take possession of the surface. If a man already has a mine on land adjoining other land under which he wishes to mine, he need not take possession of any of the surface. But a man may desire to take possession of the surface, and the regulations which are referred to in sec. 73, and which have the force of law, provide that a person desiring to obtain a lease must mark out upon the land that portion of it which he desires to be included in his lease, and must also mark out in another manner, by red posts, the surface area of which he desires to obtain possession. This law applies both to persons who desire to obtain leases for a term not exceeding 15 years, and also to persons who desire to take possession of land for mining purposes by virtue of miners' rights, the title to which land depends upon continuous occupation and continuance of the miners' rights. Then sec. 75 gives a right to any person who desires to obtain a lease to acquire title from the freeholder. It provides that:—"(1) Any person being the holder of a miner's right or an applicant for a lease may treat and agree with the owner or with the owner and occupier respectively of any private land—(*a*) as to the amount of purchase money of the land proposed to be taken by such holder or applicant; or (*b*) as to the amount of compensation which by this Act it is declared shall be made to the owner or owner and occupier by a person who desires to mine on the land. (2) No such agreement shall have any force or validity at law or in equity unless the same is in writing and signed by the parties thereto." By sec. 78 that agreement is required to be in triplicate, and one copy is required to be forwarded to the Minister. It will be observed that sec. 75 uses the words "purchase money" and "compensation." Sec. 76 deals with the question of compensation. There is no express provision as to purchase money, except in another section relating to cities, towns, and boroughs, which are not in question here. Sec. 76 provides for two different kinds of compensation. Land is divided into two classes, viz., land alienated from the Crown before 29th December 1884, and land alienated after that time. As to land of the former class

the owner is entitled to compensation for being deprived of the possession of the surface, for damage to the surface arising from carrying on mining operations, and for the expense of severing such land from any other land of the owner, and for all consequential damage. As to land of the latter class the owner is entitled to compensation for surface damage by reason of mining thereon. Bearing in mind that sec. 75 authorizes an agreement for purchase money or for compensation, and that compensation is limited to surface damage, purchase money must mean something else. By sec. 77 it is provided that :—" 1. (*a*) If within twenty-one days after the marking out of any land as aforesaid by the holder of a miner's right, or (*b*) if within ten days after the completion of the survey of the land and the posting of the notice by the mining surveyor as provided by the regulations " (that is in the case of a person desiring to obtain a lease) " the holder of a miner's right or the applicant for a lease as the case may be and the owner or owner and occupier of the land be unable to agree upon the amount of compensation or purchase money (as the case may be) to be paid then on the complaint of any party the warden may hear such complaint and determine the amount of compensation or purchase money to be paid by the holder of the miner's right or the applicant for the lease." By sec. 78 it is provided that :—" Before any lease of private land is issued to any person other than the owner of such land the Minister shall be satisfied that the following provisions have been complied with :—(*a*) Where the amount of purchase money or compensation has been determined by the Warden that such amount has been paid or tendered to the owner or owner and occupier or that such owner or owner and occupier has or have consented in writing to the issue of the lease without such payment; (*b*) where the parties have agreed in writing as hereinbefore provided that the agreement has been executed in triplicate and one original part thereof forwarded to the Minister, and that any amount agreed to be paid before issue of the lease has been paid or tendered or such payment before issue has been waived in writing by the party entitled thereto," contemplating evidently that an agreement may provide for payment of the purchase money or compensation partly in cash before the issue of the lease and partly afterwards, whether

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by instalments or not as the parties choose to agree. Provision is thus made that, where by the agreement part of the money is required to be paid before the issue of the lease, the Minister shall be satisfied that that part has been paid, or that payment has been waived. Then sec. 74 provides that neither the holding of a miner's right nor the granting of a lease shall confer upon the lessee any right of entry upon the land for the purpose of mining, "unless and until such person shall either have paid or tendered to the owner or owner and occupier of such land the amount of compensation determined as in this Act provided," that is, in the present case, compensation for surface damage, "or have paid or tendered to the owner the purchase money of land taken under the provisions of this Part or have entered into an agreement in writing with such owner or owner and occupier as to such compensation and the payment thereof and such payment tender or agreement shall have been certified on the lease or on the registration of the claim by the owner and occupier or trustees or by the Minister or Warden; or in case no compensation is payable the same shall have been certified in the manner aforesaid." That shows that the title from the Crown is conferred by the lease, and the title from the owner of the freehold either by payment in advance of the purchase money or compensation agreed to be paid, or by payment of the compensation assessed by the Warden, or by an executory agreement as to purchase money or compensation to be paid in part in the future, and such agreement or payment is required to be certified on the lease. It appears to me to follow that the term "compensation" in sec. 74 must include purchase money, because otherwise there is no provision whatever made for the case where the title to occupy land for mining purposes is under an agreement providing for payment of future instalments, and yet by sec. 78 the Minister is required to satisfy himself that all payments agreed to be made before the issue of the lease have been made. It was suggested that the words purchase money can only be applied where the freehold is required, and reference was made to sec. 91, where, probably, purchase money for the freehold of land acquired in fee simple is dealt with. But in sec. 90 land occupied by the holder of a miner's right is spoken of as land occupied as a claim, and the purchase

money for such land is also spoken of, and when one considers the nature of a claim, it is obvious that the holder of a claim is not likely to desire to buy out and out the land on which the claim is, his own title being precarious, as it is liable to be defeated by his ceasing to occupy the land or by his omitting to renew his miner's right.

It appears to me that this part of the compensation provided for, although it is sometimes called purchase money, is in the nature of rent, unless it is a lump sum paid in advance. In either case it is compensation for land taken, as distinct from compensation for surface damage. It may be paid in advance for the whole term of the lease. If it is to be paid in cash, no question arises. But if it is to be paid during the currency of the term, then in substance it is rent, although it is called purchase money. That is, it is an ascertained price to be paid periodically for the right to occupy the surface. Whatever term may be applied to it, it is in substance rent. In sec. 29 the term compensation is clearly used in that sense, and sec. 79 (1) confirms the view. It provides that:—"If after the granting of any lease or the commencement of work on any claim marked out under this Part the lessee or holder of a miner's right desire to occupy any portion of the surface of the land comprised in such lease or claim in addition to the surface area which he is already entitled so to occupy and if within twenty-one days after notice in writing to the owner or owner and occupier by such lessee or holder of his desire, no agreement in writing be made as to the amount of compensation or purchase money (as the case may be) to be paid therefor, then on the complaint of any party the warden may subject to the provisions of this Part determine the amount of compensation or purchase money to be paid."

I am led by these considerations to the conclusion that the parties may agree for the further payment of purchase money or compensation, and that when it is to be paid in the future, it is in the nature of rent.

The next question is whether such an agreement runs with the land. I will take the case, first, where the lease is issued to the original applicant who has entered into an agreement with the freeholder for payment for the land of which the freeholder is

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deprived from time to time by future instalments, which are, in substance, rent. Sec. 74 treats the lessee in such a case as a party to the agreement, and of course he is in that case. In my opinion, the effect of the provisions of the Act to which I have called attention is that the Crown, when granting a lease of a mine, also exercises a statutory power to grant a lease of the surface on the conditions of the agreement which are to be regarded as incorporated with the covenants in the lease itself for the benefit of the owner of the freehold, and that those conditions run with the land both in favour of the assignee of the freehold and against the assignee of the lease. That is as a matter of construction of the Statute. Probably being in the nature of statutory covenants they fall within the Statute 32 Henry VIII. c. 34, as matters which touch or concern the thing demised, and bind the party occupying the land for a fixed term. For payment for the right to occupy the land is certainly a matter which touches or concerns the thing demised, and so would fall within the Statute. If that Statute does not apply I think that the *Mines Act* 1897 itself makes the conditions of the agreement statutory incidents to the demise. In the present case the agreement was not made between the lessees and the land-owner, but between Morton and the landowner. But Morton assigned the application to the defendants before the lease was issued. What effect is given by the Statute to such an assignment? What right is conferred by the mere making of an application? Sec. 98 provides that:—"Pending any application for a lease or renewal of a lease under the provisions of this Part it shall not be lawful to mark out as a claim or include within the boundaries of any claim the land applied for or any part thereof, and no such marking out shall confer any right or title to the said land." Sec. 99 (4) deprives the owner of the land, pending the application, of the right to make any agreement with the holder of a miner's right. Sec. 112 provides that:—"Any applicant for a mining lease may with the approval of the Minister and in accordance with the regulations transfer the whole or any portion of his interest in his application to any person." Sec. 74 speaks of the lessee, whoever he may be, as a party to the agreement, because the granting of a lease to him does not, where there is an

agreement for compensation or purchase money, entitle him to enter the land unless and until the agreement has been certified on the lease. In my opinion, the application for a lease creates and confers on the applicant an inchoate right, and the same rights and obligations which are conferred and imposed upon the person who was the original applicant devolve upon the lessee who has become such by reason of a prior assignment to him of the application. For these reasons, I am of opinion that these covenants, or whatever they may be called, run with the land. Sec. 29, indeed, assumes that that is so, because that section applies to all leases, and allows leases to be surrendered and a fresh consolidated lease to be issued, and it provides that, when the term of the proposed consolidated lease extends beyond the terms of the surrendered leases, "if such proposed consolidated lease shall comprise private lands compensation shall be assessed in accordance with the provisions of this Act in respect of any portion of the term thereof," that is the new term, "for which compensation shall not have been already assessed," assuming that the compensation which has been paid or agreed to be paid in respect of a lease is for the whole of its term, or that some part of it extends at any rate over that period. Then, if a lease for a longer period is granted, title for the additional term is to be acquired from the freeholder either by agreement or by compensation so far as it has not already been acquired.

This agreement, then, running with the land, how far does it bind the defendants? So far, I would answer, as under the Statute 32 Henry VIII., c. 34, covenants run with the land, *i.e.*, so far as the agreement touches or concerns compensation or purchase money. It was contended that an agreement under this Act must be for the payment of a lump sum. The provisions of sec. 75 are that the parties may agree as to the amount of purchase money of the land proposed to be taken, or as to the amount of compensation. Ordinarily men may make an agreement in any terms they choose. The payment may be by cash or in kind. It may be payable by instalments or on a contingency. It may be ascertained in any way the parties think fit, except so far as their liberty is restrained by some Statute. In the case of a speculative subject matter such as a gold mine, where all the

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money of the miners may be wasted or may become very productive, and when the value of the surface may vary very much during the term, there is nothing unreasonable in the parties making the amount of the purchase money depend on the quantity of gold that may be obtained. There is absolute liberty to contract. Anything which relates to the price to be paid for compensation for surface damage may properly be made the subject of the agreement: there is no restriction, express or implied.

In this case the agreement was as I have already stated. So far as the land to be taken or occupied, the sum of £5 an acre is part of the price, and the other part is the percentage or royalty of 3 per cent. of the gross yield of gold. It is said that it is unlawful to make an agreement to pay a royalty. Why is it unlawful? The person who makes the agreement to pay according to the quantity of gold obtained is the miner who is going to acquire from the Crown the gold in the land. It is his own gold, and there is no reason why he should not pay out of his own pocket any proportion he chooses of the gold he obtains when he does obtain it. There is, therefore, nothing in that objection.

It follows, then, that this agreement was binding in its entirety so far as the price is to be paid by instalments or rent. It was binding upon the defendants when they became assignees of the application and then lessees of the land.

The other objection is that the obligations ceased upon the surrender of the lease. It is admitted that the surrender was made for the purpose of getting rid of the defendants' obligation under the original lease. Bearing in mind that you must have two titles, one from the Crown and the other from the freeholder, the defendants can free themselves from their obligation to the Crown only by an arrangement with the Crown; and can free themselves from their obligations to the freeholder only by an arrangement with him. But they cannot free themselves from their obligations to the one by an agreement with the other. I think the doctrine laid down in the case of *London and Westminster Loan and Discount Co.* v. *Drake* (1) is entirely applicable

(1) 6 C.B. N.S., 798, at p. 810.

to the present case. I read from the judgment of the Court delivered by *Williams* J.—"On the other hand, it is laid down, as to a surrender, in *Co. Litt.*, 338*b*, that 'having regard to strangers who were not parties or privies thereto (lest by a voluntary surrender they may receive prejudice touching *any right or interest* they had before the surrender) the estate surrendered hath in consideration of law a continuance.' This doctrine has been fully adopted and acted on in modern cases."

In my opinion that doctrine is applicable to this case. The right of the freeholder was a right or interest which he had before the surrender, and the surrender cannot operate to prejudice it. Sec. 29 of the *Mines Act* 1897 assumes that that is so. It provides that if the surrender of a lease is followed by the issue of a new lease for an extended period, compensation is to be paid only with reference to the additional period, leaving the compensation agreed to be paid in respect of the original period untouched. Sec. 37 of the *Mines Act* 1904 makes it even more clear that that was the intention of the legislature. In my opinion, therefore, the defences set up by the defendants fail, and the plaintiff is entitled to retain the judgment pronounced in his favour by *Madden* C.J.

BARTON J. The learned Chief Justice has dealt completely with the case. I concur with his judgment, and by way of further illustration merely wish to refer to a case in which *London and Westminster Loan and Discount Co.* v. *Drake* (1), was unanimously followed by the Court of Exchequer. That is the case of *Saint* v. *Pilley* (2). There a lessee of business premises having become insolvent, the trustee in liquidation put up the fixtures for sale by auction, under conditions which required them to be "cleared" by the purchaser in two days from the sale. The plaintiff bought the fixtures; but with the knowledge of the trustee, allowed them to remain on the premises whilst he was treating with the landlord for a new lease. This negotiation fell through, and the trustee surrendered the premises to the landlord, who re-let them, the fixtures still remaining affixed. About a fortnight afterwards the plaintiff,

(1) 6 C.B. N.S., 798. (2) L.R. 10 Ex., 137.

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learning of the surrender, applied to the landlord for the fixtures. In an interpleader issue between the plaintiff and a person claiming title through the new tenant, it was held that the plaintiff had not lost his right by delay or laches, and that he was entitled to the fixtures. *Cleasby* B. in delivering judgment said (1), that the case of *London and Westminster Loan and Discount Co.* v. *Drake* (2), was an authority which applied to the case, and that the Court could not decide on the ground taken on behalf of the defendant without in effect overruling that decision. *Pollock* B. was of the same opinion and said (3):—"The tenant has, therefore, an interest in the fixtures which may well be the subject of an assignment. If so, then the passage from *Co. Litt.*, 338b, cited by *Willes* J. in *London and Westminster Loan and Discount Co.* v. *Drake* (4), applies, and is not only binding upon us, but is agreeable to the true notions of what is right and equitable." *Amphlett* B. was of the same opinion and said (5):—"But as to the fixtures, the plaintiff having bought and paid for them, the property in them vested in him, and he had the same right of removal which the tenant had had. Subsequently the trustee took on himself to surrender the term to the landlord, and the question is whether this surrender, though good as regards the tenant, could prejudice a third person who had derived an interest for value from the tenant through the trustee. It is a well known rule that a man cannot derogate from his own grant, and the surrender to the landlord must therefore be subject to the sale previously made to the plaintiff. I should without hesitation apply that rule if there were no decision to that effect; but we have an express authority in *London and Westminster Loan and Discount Co.* v. *Drake* (6)." The decision in the last-mentioned case having thus been expressly adopted as late as 1875 by the Court of Exchequer, no doubt is left upon my mind as to the law upon which the principle is founded. I am, therefore, of the same opinion as the learned Chief Justice upon that part of the case. The surrender of the lease with the view to obtain a fresh lease in order to relieve the defendants from the burden of the agreement which was acted on and adopted

(1) L.R. 10 Ex., 137, at p. 139.
(2) 6 C.B. N.S., 798.
(3) L.R. 10 Ex., 137, at p. 140.
(4) 6 C.B. N.S., 798.
(5) L.R. 10 Ex., 137, at p. 141.
(6) 6 C.B. N.S., 798.

by them, and by which they are sought to be bound, is a piece of futility, and I am glad to think it is, because it is my distinct opinion that this company, in the manner in which they have dealt with the plaintiff and his rights, have evinced a spirit which, to put it at its best, is not creditable.

I therefore concur in the judgment of the Chief Justice.

O'CONNOR J. read the following judgment. In this case the respondent, Armstrong, seeks to enforce the contract of the 13th April 1901, against the appellant company. It is admitted that the contract was made between Armstrong and Morton before the appellants had any existence as a company, and that the respondent cannot make them liable unless he can establish either that there was a novation of the contract after the company came into existence, or that by the operation of the *Mines Act* 1897 the transfer to them under sec. 112 of all Morton's interest in the application vested in them all Morton's rights, and imposed on them all his obligations under the contract. It is essential to novation that there should be an independent contract by which the new party binds himself in the terms of the old contract. It is not contended that there was in this case any express independent contract of that kind, but it is said that such a contract can and ought properly to be implied from the facts. As one answer to that contention it was urged by the appellants, in view of the requirement of sub-sec. 2 of sec. 75, that an agreement for compensation shall not be valid unless in writing, that no such implied contract can have any validity. The Chief Justice in the Court below held that that requirement could be waived, and was waived by Armstrong. It is unnecessary to express any opinion on that point because it appears to me that there is no evidence to justify the implication of any such independent contract between Armstrong and the company. No doubt, both parties from the beginning of work under the lease acted under the agreement of the 13th April, and up to the time of the surrender complied with its provisions. But they did so, not because of the existence of any independent contract of novation, but because they both believed, mistakenly as the appellants contend, that the terms of the original agreement were

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binding on them. These circumstances of themselves furnish no evidence of an implied contract. The case of *In re Northumberland Avenue Hotel Co.* (1) is in point, and the observations of *Lopes* L.J. are applicable to the facts before us (2). "It seems to me," he says, "impossible to infer such a contract, for it is clear to my mind that the company never intended to make any new contract, because they firmly believed that the contract of the 24th of July was in existence, and was a binding, valid contract. Everything that was done by them after their incorporation appears to me to be based upon the assumption that the contract of the 24th of July 1882, was an existing and binding contract." The case of *Bagot Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.* (3) is also an authority that from such circumstances of themselves there can be no implication of a contract carrying liability either at law or in equity. *Vaughan Williams* L.J., in reference to a contention raised in that case similar to the respondent's contention in this, says (4):—"And, as I understand it, the suggestion is this, that the defendants are liable to the plaintiffs, not in law, but in equity, because, though the contract of March 3 was not made with the defendants, and the licence of March 4 was not granted to them, yet they have had the benefit of the licence and have been acting under it. This, it is said, makes them in equity directly answerable to the plaintiffs. They have, it is said, received the benefit which has resulted from a contract to which they were not parties, and they have thereby taken upon themselves the burden of that contract. To my mind that has never been the law." In my opinion, therefore, there was no novation of the original agreement of the 13th April 1901, and, apart from the operation of the *Mines Act* 1897, it cannot bind the appellant company.

I think the appellants are right in their contention that, even if upon transfer of the original applicant's rights under sec. 112 they did become bound to carry out all the obligations under his agreement with the land owner for compensation, they can only become bound in respect of obligations which could legally be imposed under the Act. They urge that in respect of two matters

(1) 33 Ch. D., 16.
(2) 33 Ch. D., 16, at p. 22.
(3) (1902) 1 Ch., 146.
(4) (1902) 1 Ch., 146, at p. 156.

for which it provides the agreement goes beyond the sanction of the Act. The undertaking to pay compensation by means of a royalty is, it is urged, contrary to the Act. It is also contended that the compensation on the face of the agreement includes something more than the compensation for surface damage which the landowner is entitled to under sec. 76, sub-sec. (*b*). There is no ground for the first objection. The royalty is a percentage on the yield of gold obtained from the land. When the gold is won it becomes by virtue of the lease the mineowner's property, and unless there is a prohibition in the *Mines Act* against making a stipulation in that form, it is quite legal and binding. The Act contains no prohibition express or implied against it. The Attorney-General referred us to sec. 16 of the *Mining on Private Property Act* 1884, which was the section in that Act conferring upon the landowner the right to make an agreement for compensation with the applicant for a gold mining lease. The last words of that section are as follows:—"Notwithstanding anything herein contained, an agreement or contract may be entered into with the owner and occupier for compensation being made by percentage of the gold taken from the mines under such land or otherwise."

In the subsequent legislation, which repealed that Act and substituted other provisions, those words are not repeated. From that omission it is sought to draw the inference that the legislature intended to prohibit an agreement for compensation in that form. There is no justification for the inference to be found in the words themselves or in any of the Mining Acts. Without those words a contract to pay compensation by a royalty upon gold won by the lessee would have been legal. Their insertion in the earlier Act was therefore unnecessary, and their omission in the subsequent legislation can have no significance.

With regard to the next objection, that the agreement stipulates for compensation outside the Act, that is to say, for something beyond surface damage, it will be well to examine the agreement before considering the provisions of the Act. After reciting that Morton had applied under the *Mines Act* for a mining lease, and that Armstrong was the owner of the land and had claimed compensation under the Act, it alleges "it has been and is hereby

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mutually agreed and determined" between the parties as follows: "That the amount of compensation to be paid to the said John Armstrong under the said Act for damages shall be the sum of twenty-five pounds for five acres of the surface of the land to be taken and occupied by the said John Morton" for the purpose of making or sinking from the surface such shaft or shafts as may be deemed necessary or requisite for conducting mining operations, and the sum of five pounds for any additional acre, &c., of the surface of the said land taken and occupied by the said John Morton for machinery, sludge, trains or railways, &c. The agreement is one for the payment of compensation, not purchase money. It contains no mention of purchase money. It will be noted that the portions of the land in respect of which five pounds per acre is to be paid are to be used for purposes which will completely occupy and cover the surface of the land so that it can be put to no other use, whereas work may go on under other portions of the lease without any use of the surface or any risk of damage to the surface beyond that of subsidence. In this respect the agreement follows the Act and the Regulations. The latter very reasonably draw a distinction between portions of the lease in which the surface is to be used and occupied, and portions in which the surface is not to be used, and in respect of which, therefore, surface damage will be indirect and contingent only.

Sec. 73 requires the applicant to peg out the land to be applied for according to Regulations. One of the Regulations—it is set out at length in *Gardner* v. *Büttner* (1)—provides that in case "only a portion of the surface is required the same shall be marked out by posts painted red . . . so that the posts may if possible be kept so erected and painted until the termination of the proceedings under these Regulations." The object of such a regulation is that the parties and the Warden may be able, in assessing compensation, to judge what portions of the surface will be taken and occupied completely for the purpose of the mine, and what portions will be subject only to such damages as may arise from underground workings. The distinction is also recognized in sec. 79, which provides that if after commencement of work on any lease the lessee wishes to occupy any portion of the surface

(1) 27 V.L.R., 106.

of the land comprised in his lease which he is not then entitled to occupy he may, after notice to the owner, and on failure to agree about the further compensation, have the further compensation or purchase money assessed by the Warden. This distinction between the parts of the land taken and occupied completely from the surface downwards, and those on which the lessee exercises his rights only under the surface, is essential to the fair adjustment of the respective interests of the landowner and the mineowner. Taking its general effect, therefore, the agreement fixes compensation for damages to the portions taken and occupied at what is probably equal to the purchase price of the fee simple, and adjusts all other damage to the surface by payment of a percentage of the gold yield. There is nothing contrary to the Act in such an agreement. Sec. 76, no doubt, limits the amount of compensation in the case of land alienated, as this was, after the 29th December 1884, to "compensation for surface damage." But, if the lessee so uses the surface as to destroy to the owner its value completely, and practically permanently, it may well be that the whole value of the fee simple would not be an unreasonable compensation. It may be conceded that the parties cannot make an agreement under the Act for a compensation which the Warden could not award under sec. 77, but there is nothing in the Act to prevent the Warden from awarding, in respect of land actually taken and occupied, compensation for damages to the full extent of its fee simple value, and I can see no reason why the parties, if they think fit, should not fix the compensation at any amount which the one is willing to take and the other to give as representing that value. I may add that I entirely concur in the view of my learned brother the Chief Justice as to the meaning of the word "compensation" as used in sec. 74, and the other sections to which he referred. Therefore, whether the compensation is regarded as purchase money, or as merely compensation for damage to the surface, it may be lawfully included in an agreement under the Act. It follows therefore that the Attorney-General has failed to show that the agreement is outside the authority of the Act.

The next question is, did the benefits and the obligations of the agreement vest in the appellant company on Morton's transfer to them of his interest in the application?

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I may say here, with regard to the question whether the obligations under the agreement are such as would, apart from the operation of the Statute, run with the land, I agree with the observations of my learned brother the Chief Justice. But I base my judgment upon the operation of the Statute. In my opinion, all the benefits and all the obligations of the agreement for compensation passed to the appellant company on the transfer of Morton's application under sec. 112. The Crown grant not only excepts the gold in the land granted, but reserves to the Crown and its agents the exercise of such rights over the land as may be necessary for sinking shafts and carrying on in other ways the operation of winning the gold. It is in the power of the Crown, and not of the landowner, to give such rights over the surface to the lessee. One of the objects of the Act of 1897 is to provide machinery for conferring those rights on the lessee or miner. But it enacts, as a condition to be fulfilled before those rights are conferred on the lessee or miner, that he shall pay or make a binding agreement to pay the landowner compensation. The intending lessee can make no agreement for compensation with the landowner until he has become an applicant for a lease under the Act. By sec. 99 the application is pending from the marking out of the land until the granting of the lease. By sec. 78 the Minister cannot issue a lease until compensation has been awarded by the Warden or the agreement with the landowner has been executed and filed with the Minister, and by sec. 74, even when the agreement has been executed, no right of entry under the lease is given until payment of the agreed compensation has been certified on the lease. The whole scheme of the Act shows that the agreement for compensation is not, as was contended, an independent transaction with the landowner going on contemporaneously with the application, but is a necessary step in the application itself, and a condition precedent to its being granted, and that condition the Government take upon themselves to secure by making its fulfilment a necessary step in the application. Under the circumstances the word "application" in sec. 112 must therefore be taken to include, not merely the application for the lease, but the ancillary agreement with the landowner without which it cannot be granted. If this were not so it is

difficult to see how an application could be effectually transferred. No transfer could take place without the consent of the landowner or a new inquiry as to compensation. I agree with Mr. Mitchell that the provisions of sec. 77 strongly support this contention. I am of opinion, therefore, that the transfer of Morton's interest in his application vested in the appellant company all the benefits and all the obligations of the agreement of April 1901.

Upon the face of it the agreement is to enure for a fixed term contemporaneous with the term of the lease. But it is contended that the appellants by their surrender of the original lease have relieved themselves of their obligations under the agreement. That the transferee of the application can thus by his own act rid himself of the obligations of the agreement by virtue of which he took possession of the land is a proposition which, fortunately, cannot be successfully maintained. The principle laid down by Lord *Campbell* L.C., in *Piggott* v. *Stratton* (1) applies. Quoting the judgment of Lord *Ellenborough* C.J., in *Beadon* v. *Pyke* (2), he says:—"We consider it as clear law, that though a surrender operates between the parties as an extinguishment of the interest which is surrendered, it does not so operate as to third persons, who at the time of the surrender had rights, which such extinguishment would destroy, and that as to them, the surrender operates only as a grant, subject to their right."

The Government and the company must both be taken to have been aware that the rights of the landowner under the agreement depended upon the existence of the lease, that the payment of compensation depended upon the working of the mine, and that the compensation came year by year from the working of the mine by the appellants under that lease. Under these circumstances it appears to me that the principle underlying the decision in *Werderman* v. *Société Générale D'Electricité* (3) applies, and that it was not open to the company by any arrangement they chose to make with the Government to relieve themselves of their obligations to the landowner under the agreement, nor could they by surrender of the original lease relieve themselves of their liability to pay the compensation as stipulated for in the original

(1) 1 De G. F. & J., 33, at p. 46. (2) 5 M. & S., 146, at p. 154.
(3) 19 Ch. D., 246.

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agreement. Although they now hold and work the land under the new consolidated lease from the Government, they are still liable to pay the royalty agreed upon as compensation under the original agreement. For these reasons I am of opinion that the learned Chief Justice in the Court below came to a right conclusion, and that the appeal must be dismissed.

*Appeal dismissed with costs.*

Solicitor, for appellants, *H. M. Lee*, Melbourne.

Solicitors, for respondent, *Braham & Pirani*, Melbourne, for *Mark Lazarus*, Ballarat.

B. L.



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[HIGH COURT OF AUSTRALIA.]

PRIOR . . . . . APPELLANT;
DEFENDANT,

AND

SHERWOOD . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 11, 14, 15.

Griffith C.J., Barton and O'Connor JJ.

*Gaming and Wagering—Place used for Betting—Public right of way or lane—Games, Wagers and Betting Houses Act* (*N.S.W.*), (*No.* 18 *of* 1902), *secs.* 17, 19.

A bookmaker carried on his business standing in a lane or right of way which led from a street to the back entrances of some houses facing the street. The lane was open to the public at all times, and the part in which the bookmaker stood was a *cul de sac* branching off from the main passage. He had