

the respondent for an answer. That being so, I have come to the conclusion that I must dismiss the petition. I order the petitioner to pay the respondent's costs to the extent of £100, and the £50 deposit to be applied towards payment of the costs.

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Petition dismissed with costs.

Solicitors, for the petitioner, *Strongman & Crouch.*
Solicitors, for the respondent, *McCay & Thwaites.*

B. L.

[HIGH COURT OF AUSTRALIA.]

STIGGANTS APPELLANT ;
DEFENDANT,

AND

JOSKE RESPONDENT.
INFORMANT,

Dentist—Person “recorded” by the Dental Board—Use of word “Dentist”—
Words implying that he is practising dentistry—Dentists Act 1898 (Vict.) (No.
1595), sec. 7—Dentists Act 1910 (Vict.) (No. 2257), sec. 13 †.*

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Oct. 9, 10,
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* Sec. 7 of the *Dentists Act 1898* provides that:—No person other than a legally qualified medical practitioner or other than a person registered under the *Dentists Act 1887* or under this or the Principal Act shall, nor shall any company (other than an association consisting wholly of registered dentists), take or use or by inference adopt the name title word letters addition or description, of “dentist” or “dental practitioner” or “dental surgeon” or “surgeon dentist,” or use or have attached to or exhibited at his or its place of business or residence (either alone or in combinations with any other word or words or letters) the

words “dental company” or “dental institute” or “dental hospital” or “dental college” or “college or school of dentistry” or “mechanical dentist” or any name title word letters addition or description implying or tending to the belief that he or such company is registered under the *Dentists Act 1887* or under this or the Principal Act or that he or such company is qualified to practice dentistry or is carrying on the practice of dentistry or is entitled to or to use such name title word letters addition or description.

† Sec. 13 of the *Dentists Act 1910* provides that:—

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The prohibition in sec. 7 of the *Dentists Act* 1898 (Vict.) against the use by any person other than a legally qualified medical practitioner or a person registered under the Dentists Acts, of the title "dentist" or "dental practitioner" or "dental surgeon" or "surgeon dentist," applies to persons recorded by the Medical Board of Victoria under sec. 13 of the *Dentists Act* 1910. But, notwithstanding the prohibition in sec. 7 of the Act of 1898 against the use by any person other than those specified of any name, title &c. implying or tending to the belief that he is registered, or that he is qualified to practice dentistry, or is carrying on the practice of dentistry, a person recorded under sec. 13 of the Act of 1910 is entitled to use, in addition to the words "Recorded by the Dental Board of Victoria," words which will explain to the public what it is that he is recorded as being permitted to do, provided those words do not imply that he is registered.

Appeal from the Supreme Court of Victoria (*Madden C.J.*): *Joske v. Stiggants*, 33 A.L.T., 80, dismissed, but on different grounds.

APPEAL from the Supreme Court of Victoria.

At the Court of Petty Sessions at Fitzroy, on 9th August 1911, George Edwin Stiggants was charged on the information of Ernest Joske, Registrar of the Dental Board of Victoria, "for that he not being a legally qualified medical practitioner nor a person registered under the *Dentists Act* 1887, nor under the *Medical Act* 1890, Part II., nor under the *Dentists Act* 1910 did at Fitzroy on 14th July 1911, at his place of business at Gertrude Street have exhibited a title to wit 'Dentist' implying that he was registered under the *Dentists Act* 1887 or under the *Dentists Act* 1898 or under the *Medical Act* 1890, Part II."

It appeared that the defendant was recorded by the Dental Board under sec. 13 of the *Dentists Act* 1910, and that he had on his door a brass plate on which were inscribed the words "G. E. Stiggants, Dentist, Recorded by the Dental Board of Victoria."

Stiggants was convicted and was fined £5 with £3 3s. costs.

(1) Notwithstanding anything in this or any other Act any person who has attained the age of twenty-one years and who has practised dental surgery or dentistry in Victoria for a period of at least three years immediately prior to the commencement of this Act may on application within six months thereafter to the Dental Board and on proof that he has so practised and on paying the prescribed fee be entitled to have his name recorded by such Board.

(2) Thereupon such person shall continue to have the same rights and pri-

vileges which he possessed immediately before the commencement of this Act so far only as the practice of dental surgery or dentistry is concerned but he shall not take or use or have attached to or exhibited at his place of business or any premises the word "registered" (either alone or in combination with any other words or letters) or any other word or sign implying or tending to the belief that he is registered as a dentist other than the words "Recorded by the Dental Board of Victoria."

An order *nisi* to review this decision obtained by the defendant on the grounds that there was no evidence of the offence charged in the information, and that the acts of the defendant alleged to have constituted the offence were authorized by the *Dentists Act* 1910, was discharged by *Madden*, C.J. (*Joske v. Stiggants* (1)).

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The defendant now by special leave appealed to the High Court.

Irvine K.C. (with him *Lewers*), for the appellant. Before the *Dentists Act* 1898 persons other than legally qualified medical practitioners and registered dentists were not prohibited from practising dentistry, but they could not sue for fees. [He referred to the *Dentists Act* 1887, secs. 2, 16, 17, 18; *Medical Act* 1890, Part II., secs. 38, 52, 53, 54.) Under the *Dentists Act* 1898 those persons might still practise dentistry, although they could not sue for their fees, and by sec. 7 they were absolutely prohibited from using the title "dentist," among others, and from using any other words which might imply that they were registered, or were qualified to practise dentistry or were carrying on the practice of dentistry. By the *Dentists Act* 1910, sec. 4, permission was given to certain "recorded" persons to practise dentistry. Sec. 5, which prohibits any person from carrying on dentistry except in his own name, implies that a person who is entitled to practise dentistry may tell the public that he is so practising. Sec. 11 gives to "recorded" persons all the rights as to practising dentistry which a registered dentist has. It recognizes the right of a "recorded" person to practise dentistry, and therefore recognizes his right to inform the public that he is doing so, provided he does not inform them that he is registered. Sec. 7 of the Act of 1898 therefore can have no application to "recorded" persons for whom special provisions are made in sec. 13 of the Act of 1910. Even if the first prohibition in sec. 7 applies to "recorded" persons so as to prevent the use by them of the word "dentist"; the second prohibition, namely, that as to the use of words implying registration or that a person is carrying on the practice of dentistry, is inconsistent with the

(1) 33 A.L.T., 80.

H. C. OF A. provisions of the Act of 1910 so far as "recorded" persons are
1911. concerned, and is to that extent abrogated.

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The word "dentist," although in the Acts it means a registered dentist, when used in the collocation in which it is used by the appellant, does not imply that he is registered, but merely indicates that he is carrying on a lawful business, so that the conviction was bad. [He referred to *Joske v. Lubrano* (1).]

Duffy K.C. (with him *Mackey* and *Schutt*), for the respondent. Under the Act of 1898 the only right that persons other than medical practitioners and registered dentists had was to practise dentistry, and the effect of sec. 7 of that Act was to prohibit them from advertising or otherwise informing the public that they were practising dentistry. By sec. 13 of the Act of 1910 the same rights were preserved to "recorded" persons that they had under the Act of 1898, and the only other right they were given was to use the words "Recorded by the Medical Board of Victoria." The prohibition against informing the public that they are practising dentistry is removed to the extent only of permitting them to announce that they are "recorded." There is no implied repeal of any part of sec. 7 of the Act of 1898 for the whole of it can stand consistently with sec. 13 of the Act of 1910. Sec. 11 of the Act of 1910 shows that no repeal of sec. 7 was intended, for it amends that section as from 15th November next. The use of the word "dentist" is absolutely prohibited by sec. 7 of the Act of 1898. That word in itself implies that the person using it is a registered dentist, so that the information and conviction are good as they stand. [He referred to *Bellerby v. Heyworth* (2); *Byrne v. Rogers* (3); *R. v. Registrar of Joint Stock Companies for Ireland* (4).]

Irvine K.C., in reply.

Cur. adv. vult.

Oct. 10.

GRIFFITH C.J. In this case the appellant was charged with a breach of sec. 7 of the *Dentists Act* 1898. That section, as was

(1) 4 C.L.R., 71.

(2) (1910) A.C., 377.

(3) (1910) 2 I.R., 220.

(4) (1904) 2 I.R., 634.

pointed out in the case of *Joske v. Lubrano* (1), contains two distinct prohibitions. The first is that "no person other than a legally qualified medical practitioner or other than a person registered under the *Dentists Act* 1887 or under this or the Principal Act shall, nor shall any company . . . take or use or by inference adopt the name title word letters addition or description, of 'dentist' or 'dental practitioner' or 'dental surgeon' or 'surgeon dentist.'" That is the first prohibition. The second is that "no person" (with the same exceptions) "shall use or have attached to or exhibited at his or its place of business or residence (either alone or in combination with any other word or words or letters) the words 'dental company' or 'dental institute' or 'dental hospital' or 'dental college' or 'college or school of dentistry' or 'mechanical dentist' or any name title word letters addition or description implying or tending to the belief that he or such company is registered under the *Dentists Act* 1887 or under this or the Principal Act or that he or such company is qualified to practise dentistry or is carrying on the practice of dentistry or is entitled to or to use such name title word letters addition or description." The charge preferred against the appellant was under the second prohibition in that section, in these words, "that he not being a legally qualified medical practitioner nor a person registered" and so on, "did . . . at his place of business . . . have exhibited a title to wit 'dentist' implying that he was registered" under the Acts. That is, he was not charged *simpliciter* under the first prohibition with using the title dentist, but with exhibiting a title implying that he was registered, and the title "dentist" was brought in under the *videlicet*. The words that the appellant actually used were "Dentist recorded by the Dental Board of Victoria." The appellant contends that he was entitled to use those words by virtue of certain provisions of the *Dentists Act* 1910, to which I will afterwards refer, and that in that view, even if he was guilty of any offence, it was against the first prohibition of sec. 7, and not of the offence of using a title implying that he was registered. I think that contention is sound, and that the conviction could not be supported without amendment. With an amendment it might

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be supported as a breach of the first prohibition Having regard to the provisions of the Act of 1910 I think the words actually used did not imply that he was registered. But the substantial question desired to be determined, and which the Court thought sufficiently important to justify granting special leave to appeal, is whether the word "dentist" may be used at all by persons in the position of the appellant.

Before referring in detail to the Act of 1910, I should mention that by sec. 52 of the Principal Act it was provided that after the coming into operation of the Act no person other than a legally qualified medical practitioner should be entitled to call himself a "dentist," or "dental practitioner," or "dental surgeon," or "any name title addition or description implying that he is registered under the *Dentists Act* 1887 or under this Part of this Act or that he is a person specially qualified to practise dentistry" unless he was registered under the proper Act. Sec. 53 provides that a person registered under the provisions for registration of dentists and every legally qualified medical practitioner should be entitled to practise dental surgery and dentistry in any part of Victoria, and to sue for the recovery of his fees for services in dentistry, but that no other person should be entitled to recover any fee or charge in any Court of law for any such services.

Before the Act of 1910 the law did not make it unlawful to practise dentistry for fee or reward, but it did not allow an action to be brought in a Court of law to recover fees. There was, however, in the Act of 1898 a provision that no person not being a legally qualified medical practitioner or a registered dentist was entitled to use words implying or tending to the belief that he was carrying on the practice of dentistry. So that any other person was allowed to carry on the practice of dentistry provided that he did not use any words suggesting that fact. How it was done I do not know.

Then came the Act of 1910, which provides by sec. 4 that "No person who is not registered as a dentist or recorded as herein-after provided shall except as hereinafter provided practise dental surgery or dentistry for fee or reward, or for expectation of fee or reward." The provisions referred to by the

word "recorded" are contained in sec. 13, which provides that persons of the age of 21 years who had been practising dental surgery or dentistry in Victoria for at least three years immediately prior to the passing of the Act, and who had proved that fact to the Dental Board within six months, should be entitled to have their names recorded by the Board. The second paragraph of the section is as follows:—"Thereupon such person shall continue to have the same rights and privileges which he possessed immediately before the commencement of this Act so far only as the practice of dental surgery or dentistry is concerned but he shall not take or use or have attached to or exhibited at his place of business or any premises the word 'registered' (either alone or in combination with any other words or letters) or any other word or sign implying or tending to the belief that he is registered as a dentist other than the words 'Recorded by the Dental Board of Victoria.'" The person so recorded was to have the same rights and privileges as he had before, that is to say, he was lawfully entitled to carry on the practice of dentistry, but he could not sue for his fees. Before the Act he was not allowed to use any words or sign intimating to the public that he was carrying on the practice of dentistry, but under this Act he was entitled to use the words "Recorded by the Dental Board of Victoria." Sec. 5 provides that no "person shall practise dental surgery or dentistry except in his own name." What seems to follow so far is that here is a lawful occupation recognized. It is to be carried on in his own name. He is to be entitled to intimate to the public—as he was not before—that he is carrying on that practice. But he is not entitled to use any words implying that he is registered except the words "Recorded by the Dental Board of Victoria." The learned Chief Justice of Victoria thought that those were the only words that could be used—that it might not be suggested for what purpose a person was recorded by the Dental Board. If nothing more was said, it might be that he was recorded as a manufacturer of artificial teeth.

On the Act of 1910 the appellant contends, in the first place, that the provisions to which I have referred are inconsistent with the whole of sec. 7 of the Act of 1898 so far as relates to persons

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recorded under the Act of 1910; and, secondly, he contends that, at any rate, so far as these persons are concerned, the prohibition in sec. 7 which prohibits them from intimating to the public that they are carrying on the practice of dentistry are no longer applicable, and are abrogated.

As to the first point, the question whether the whole of sec. 7 is abrogated, it does seem strange that a man should be authorized to carry on the practice of dentistry, and still should not be allowed to use the word "dentist." But I find the provisions of the Act of 1910 too strong to admit of the construction contended for, and in particular the provisions of sec. 11 of the Act of 1910, which amend sec. 7 of the Act of 1898. It is true that sec. 11 does not come into operation until 15th November next, but it may be referred to for the purpose of ascertaining the intention of the legislature. The contention is that there is an implied repeal of sec. 7 so far as relates to those persons who are recorded. On 15th November sec. 7 will read, "No person other than a person registered as a dentist shall," and then the section follows as before. So that from 15th November the legislature has said that no person other than a person registered as a dentist shall use the name of "dentist," &c. I do not see how that express prohibition is to be escaped from. So that the appellant was technically guilty of an offence against that provision of sec. 7, which was not the offence with which he was substantially charged. But sec. 13 of the Act of 1910 does not say, as the learned Chief Justice of Victoria seems to have thought, that a person recorded may not use any other words than "recorded by the Dental Board of Victoria." It says that he shall not use any other words "implying or tending to the belief that he is registered as a dentist." He is entitled by necessary implication to tell people that he is carrying on the business of a dentist, although he is forbidden to use that word, or to tell them that he is registered as a dentist. In my opinion, he is entitled to publish to the world the fact that he is carrying on a lawful profession, provided that he does not transgress the positive prohibition that he must not use the forbidden word, or tell them that he is registered. I think I am justified in saying that a person in this position is entitled to add to the words

"Recorded by the Dental Board of Victoria" words such as "as authorized to carry on the practice of dentistry," or "as authorized to practise dentistry," because, having regard to the law of Victoria, neither of those expressions would to any person at all conversant with the subject imply or tend to the belief that he is registered as a dentist. He is therefore not within the prohibition of sec. 13 of the Act of 1910 in using those words, nor of sec. 7 of the Act of 1898, which to that extent is abrogated by sec. 13. I think, therefore, that the appellant was technically guilty of an offence, though not the offence charged, but he has practically obtained a substantial amount of relief by this appeal. The appeal must be formally dismissed.

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BARTON J. I also think that the appellant has in strict technicality committed an offence which, though it is not in substance that with which he was charged in the information, nevertheless is one to cover which the information and conviction could be amended. I do not intend to go over the whole ground of the Statutes to which his Honor the Chief Justice has referred sufficiently. For my purpose it is sufficient to draw attention to the first branch of sec. 7 of the Act of 1898, which says, cutting the words down to those which are material, that no person other than a person registered shall take or use or by inference adopt the name of "dentist." That portion of the section is not accompanied by the words "implying or tending to the belief that" the person using the name is qualified to practice dentistry. If the information had been laid precisely upon that branch of the section, and if the legislation had proceeded no further, there is a plain prohibition of the use of that word "dentist" which is not nullified by the fact of its use in the connection in which it appears on the appellant's plate.

But then we were referred to the Act of 1910, sec. 4 of which provides that:—[His Honor read the first paragraph of the section]—with a proviso which does not affect this case. Sec. 13 then says that [His Honor read paragraphs (1) and (2) of the section.] The question has arisen whether secs. 4 and 13 effect an implied repeal of sec. 7 of the Act of 1898 or of any part of it, and, failing the conclusion that they do effect an implied

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repeal, the question is whether this legislation makes an exception from sec. 7 of such a character as to take the offence, which otherwise the appellant would have committed against the first branch of sec. 7, out of the operation of that section. I do not think that that is so. It is quite clear that there is no implied repeal. And having regard to its scope and purpose I do not think that the provisions of sec. 4, which relates entirely to the practice of dentistry or dental surgery for fee or reward, have the effect of making an exception, so far as taking or using the name or title of "dentist" is concerned, to the provisions of sec. 7. The matter is carried no further by sec. 13 of the Act of 1910. But there is in sec. 11 (4) a provision that [His Honor read the sub-section and continued]. That provision, although it does not come into operation until 15th November next, shows the intention of Parliament to maintain sec. 7, except so far as that amendment might extend. After the amendment the appellant was as much within the prohibition as he was before it.

I find that the appellant has technically come within the law by taking the name or title of "dentist." He has offended against that prohibition of sec. 7, but it does seem absurd that where he has used in addition to the word "dentist" the words "Recorded by the Dental Board of Victoria," which addition shows that he was only promulgating his right to practise dentistry by reason of his being recorded, nevertheless he should be fined. But when you find a prohibition like that in sec. 7 in express terms without any qualification, it is the duty of the Courts to bow to the will of Parliament, and therefore it is our duty to hold that the appellant falls within the prohibition. It is true, as has been pointed out, that sec. 13 (2) of the Act of 1910 says that a person recorded shall not take or use the word "registered" "or any other word or sign implying or tending to the belief that he is registered as a dentist, other than the words 'Recorded by the Dental Board of Victoria'." But it is quite clear that that portion of sec. 13 is a prohibition against using terms implying or tending to the belief that there is registration as a dentist. If then, in addition to the words "Recorded by the Dental Board of Victoria," there be used other words which do not imply that the practitioner is registered as a dentist, I see no provision of the

law which prevents his using terms to amplify the meaning of the words "Recorded by the Dental Board of Victoria." He is not prohibited from using any other words but those, but he is prohibited from using any addition to those words implying that he is registered as a dentist. If the words that he adds do not imply that he is registered as a dentist, he is, in my opinion, entitled to use them. Although by the technical provision of sec. 7 of the Act of 1898 the appellant is in this prosecution—which I cannot help thinking is a most oppressive one—bound by amendment of the conviction to pay a fine, there are means open to him and others, who by the express provisions of the law are entitled to practise dentistry, of saying to people or showing on their door plates that although they are not registered, they are entitled to practise dentistry. I agree, although with reluctance, that the appeal should be dismissed.

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O'CONNOR J. The information and conviction as they stand at present do not bring out the real matter in controversy between the parties, and I agree that the Court on this appeal should consider them in a form so amended as to raise the real question which the parties came here to have decided. I take it that the real question in issue is whether a person who comes within the class described by sec. 13 of the Act of 1910 is entitled to use the word "dentist" in connection with the words "Recorded by the Dental Board of Victoria," which he is authorized to use by sec. 13. This is one of those cases in which it is impossible to arrive at the meaning of the latest Act in this series of Acts without considering what the policy of the whole body of legislation regarding dentists has been. The scheme by which the legislature has dealt with the question is perfectly clear from the three Acts brought before us. The first step was that given effect to by all the Acts before 1910, and it was to regulate the profession of dentistry by providing for the registration of persons properly qualified to practise, and to protect the public against attempts to impose upon it by persons not registered or not qualified, by prohibiting anything like the assumption of titles, or the representation of titles, which implied or tended to induce the public to believe that practising dentists not registered were registered.

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1911. and not registered the position was this—they were allowed to
STIGGANTS continue to practise but they could not obtain the assistance of
v. the Courts to recover their fees, and they were prohibited, as
JOSKE. other unregistered persons were prohibited, from using the words
O'Connor J. “dentist,” or “dental practitioner,” or “dental surgeon,” or
“surgeon dentist” as an addition or title. That prohibition was
absolute. They were also prohibited from using any words
implying that they were registered under any of the Dentists
Acts.

But in the Act of 1910 the further step was taken of prohibiting the practice of dentistry by any persons except those registered. It is evident, however, that in carrying out that policy there would be a hardship to the public and to a large number of practitioners, and, therefore, in order to alleviate that hardship as much as possible, sec. 13 was passed. That section picks out from the class of persons practising dentistry all those over 21 years of age who had been practising dentistry for at least three years before the commencement of the Act and who were unregistered—persons who up to that time, although allowed to carry on the practice of dentistry, had no recognition by Statute. With regard to that class the legislature enacted sec. 13.

Now, it is clear that before the Act of 1910 any member of that class would have been liable to prosecution for using the word “dentist” in an advertisement or on his plate, no matter what words were used in connection with it, because the prohibition of the use of the word “dentist” is absolute. The question really raised by Mr. *Irvine* is this:—Whether sec. 13 has with regard to that class of persons impliedly repealed the prohibition of sec. 7 of the Act of 1898. It becomes, therefore, necessary to examine the provisions of sec. 13.

It seems to me that, unless the appellant can show that sec. 7 of the Act of 1898, in so far as the class of persons I have mentioned is concerned, has been repealed, the conviction must stand. When I look at sec. 13 I find that all it does is to permit members of that class to practise dentistry—to continue to them the same rights and privileges as they had before the Act was passed, so far only as the practice of dental surgery or dentistry is con-

cerned. Then follows this prohibition:—"He shall not take or use or have attached to or exhibited at his place of business or any premises the word 'registered' . . . or any other word or sign implying or tending to the belief that he is registered as a dentist other than the words 'Recorded by the Dental Board of Victoria.'" Now, it will be observed that in sec. 7 of the Act of 1898 two matters are dealt with separately. The first is using the name of "dentist," &c., which is prohibited absolutely, and the other is using any word implying registration. It is with this latter condition of things that sec. 13 deals, and with regard to that it renews the prohibition against using any word which implies registration except the words "Recorded by the Dental Board of Victoria." But sec. 13 makes no mention whatever of the earlier prohibition. Under such circumstances the question the Court always has to consider is this:—When you have a negative prohibition—a direct prohibition—against the use of certain words, and an affirmative Statute is enacted permitting the use of certain other words, can they stand together? If they can the Court will not imply a repeal. Here the question must be asked is there anything in sec. 13 inconsistent with the prohibition in sec. 7? It seems to me there is only one answer—there is nothing inconsistent with the two sections standing as they are. That is to say, there is nothing inconsistent in prohibiting to the class of persons I have mentioned the use of the words "dentist," &c., in any combination of words and at the same time allowing them to publish to the world and to put on their door-plates the statement of fact that they are recorded by the Dental Board of Victoria. I entirely concur in the observations of the learned Chief Justice that the Act of 1910 necessarily implies that there is a right to state in some form or other what it is that the Dental Board records them as being permitted to do, and I quite agree that some such form of words as he refers to may be used—such as the words as "as authorized to practise dentistry," or "as authorized to carry on the practice of dentistry," may very well be used with the words "Recorded by the Dental Board of Victoria" in order to give practical effect to the privilege which undoubtedly sec. 13 intended to confer upon this particular class of persons. I therefore agree that sec. 13 does

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Appeal dismissed.

Solicitors, for the appellant, *Rogers & Rogers.*
Solicitor, for the respondent, *Joske.*

B. L.

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NSWLR 564

Refd to Epic
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M Holdings
Pty Ltd (in liq)
(1998) 71
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[HIGH COURT OF AUSTRALIA.]

THOMSON APPELLANT;
DEFENDANT,

AND

McINNES RESPONDENT;
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. 1911. *Contract—Sale of land—Memorandum in writing—Signature of party to be charged
—Personal act—Contract contained in several documents—Reference from one
document to another—Instruments Act 1890 (Vict.) (No. 1103), secs. 208, 209.*

MELBOURNE,
June 19, 20,
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Sec. 208 of the *Instruments Act* 1890 (Vict.) is a transcript of sec. 4 of the *Statute of Frauds* (29 Car. II. c. 3), and sec. 209 provides that “notwithstanding anything in this Act contained no action shall be brought upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them if the agreement or the memorandum or note thereof on which such action shall be brought be signed by any person other than the party to be charged therewith unless such person so signing be thereunto lawfully authorized in writing signed by the party to be so charged.”