Solicitor, for the appellants, *F. T. Hickford* for *Hamilton Clarke*, Benalla.

Solicitors, for the respondent, *Lamrock, Brown & Hall.*

B. L.

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BENALLA CORPORATION *v.* CHERRY.

[HIGH COURT OF AUSTRALIA.]

ALFRED EDWARD SENDALL AND ANOTHER . . . . . } APPELLANTS;

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

AND

KATE MARION CRACE AND OTHERS . APPELLANTS;

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

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SYDNEY, *Aug.* 24, 25.

Griffith C.J. and O'Connor J.

Oct. 6.

Griffith C.J.

Land Tax Assessment Act 1910 (*No.* 22 *of* 1910), *secs.* 25, 33, 62—*Land Tax Regulations* 1911, *reg. No.* 51—*Amendment—Invalidity—Land tax payable by trustee—Tenant for life—Remainderman.*

Sec. 25 of the *Land Tax Assessment Act* 1910 provides that the owner of any freehold estate less than the fee simple shall be deemed to be the owner of the fee simple, to the exclusion of any person entitled in reversion or remainder, and that for the purpose of the assessment of a tenant for life of land, without power to sell, under a settlement made before 1st July 1910, or under the will of a testator who died before that date, the unimproved value of the land shall be calculated upon the basis prescribed by that section. "Tenant for life" includes a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life.

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By sec. 33 (1) any person in whom land is vested as a trustee shall be assessed and liable in respect of land tax as if he were beneficially entitled to the land.

Held, that sec. 25 applies both to a legal and equitable tenant for life. Under this section the tenant for life is the only owner of the land for the purposes of taxation, and owners of estates in remainder are not liable to taxation.

The appellants in each case were the trustees under the will of a testator who died before 1st July 1910, having by his will devised all his real estate to his trustees, upon trust for his widow for life, with remainder to his children.

Held, that the appellants were only liable to be assessed for the amount of tax payable by the widow as life tenant.

Per Griffith C.J.—*Semble*, under sec. 25 the expectancy of life of the tenant for life is not a material element for consideration upon the question of the value of the life interest for the purpose of taxation.

The amendment of reg. 51 of the *Land Tax Regulations* 1911, of 14th September 1911, *held* inoperative as to these cases.

SPECIAL CASE stated by GRIFFITH C.J. for the opinion of the High Court under sec. 46 of the *Land Tax Assessment Act* 1910.

1. These are two appeals from assessments of land tax.

FIRST APPEAL.

2. The appellants are the trustees of the will of Arthur Bowman Chisholm deceased, who died on 18th September 1908, having by his will, dated 28th April 1900, devised to the appellants all his real estate upon trusts, which, so far as material to be stated, were upon trust to pay the income to his widow for life for her separate use, and after her death upon trust for Fanny Jane Chisholm, and all his children by his then wife who, being sons, should attain the age of 21 years, or being daughters, attain that age or marry, in equal shares.

3. The testator executed five codicils to his will, the last of which is dated 18th January 1906, but none of which affected the disposition of his real estate hereinbefore stated.

4. The testator left surviving him his widow and seven children, one being a daughter under the age of 21 years, all of whom are still living.

5. The unimproved value of the testator's land has been assessed, after making the statutory deduction of £5,000, at £26,951.

6. The unimproved value of the interest of the testator's widow in the testator's land has been assessed, in accordance with the provisions of sec. 25 of the Act, after making the like deduction, at £10,211.

7. The unimproved value of the share of each of the beneficiaries entitled in remainder is less than £5,000.

8. The respondent has assessed the land tax payable by the appellants at £213 3s. 6d., being the amount payable in respect of land of the unimproved value of £26,951.

9. The appellants claim that the only tax for the payment of which they are responsible is that payable by the tenant for life, and that land tax is not payable in respect of the shares or interests of the beneficiaries entitled in remainder.

SECOND APPEAL.

10. The appellants are the trustees of the will of Edward Kendall Crace deceased, who died on 20th December 1892, having by his will, dated 22nd March 1890, devised to the appellants his real estate upon trusts which, so far as material to be stated, were upon trust for his widow for life, and after her death upon trust for such one or more of his children or remoter issue born in his widow's lifetime as she should appoint, and in default of appointment in trust for all his children who should attain the age of 21 years or marry, in equal shares.

11. The testator left surviving him his widow and nine children, all of whom are living. All the children have attained the age of 21 years.

12. The unimproved value of the testator's land has been assessed, after making the statutory deduction of £5,000, at £33,578.

13. The respondent has assessed the land tax payable by the appellants at £296 10s., being the amount payable in respect of land of the unimproved value of £38,578.

14. The appellants claim that land tax is not payable in respect of the shares or interests of the beneficiaries entitled in

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remainder, the unimproved value of each of which, they contend, is less than £5,000, and that the only tax for the payment of which they are responsible is that payable by the tenant for life.

The questions for the opinion of Court are :—

1. Whether the appellants respectively are responsible for the payment of land tax in respect of the whole unimproved value of the respective estates, or only in respect of the unimproved value of the estate of the tenant for life, after making in either case the statutory deduction of £5,000.

2. Whether if land tax is payable in respect of the whole unimproved value, one deduction or two deductions of £5,000 should be made.

3. Whether the respective assessments appealed from ought to be reduced, and if so, to what extent.

Owen K.C. and *S. A. Thompson*, for the appellants in the first appeal. This case comes within the proviso to sub-sec. (1) of sec. 25. The scheme of the Act is that all land is taxable with certain exemptions, but the amount of the tax depends upon who is the owner of the land, and no taxation is contemplated of anyone entitled in reversion. The provision in sec. 33 that a trustee in whom land is vested shall be assessed and liable to land tax as if he were beneficially entitled to the land, must be read in conjunction with sec. 62, and so interpreted means that the trustee is bound to see that the tax is paid by the persons who are liable, not that the trustee is assessable and liable independently as owner of the legal estate. The person liable is the owner of the equitable estate: sec. 35. Where there are several joint tenants there may be several assessments. So by the second proviso to sec. 33, in the case of wills and settlements prior to 1st July 1910, a deduction may be allowed in respect of each share into which the estate is divided. The word "distributed" there means the division of the beneficial interest, leaving the legal estate in the trustee. Sec. 25 completely provides for such a case as the present where there is a life tenant in existence.

Bethune, for the appellants in the second appeal, adopted this argument.

Piddington and *J. A. Browne*, for the respondent. The argument for the appellants overlooks the distinction between the liability of the trustee as primary taxpayer, and the liability of the equitable owner as secondary taxpayer under sec. 35, and the concession granted by sec. 25 to the tenant for life as secondary taxpayer. The scheme of the Act is that the primary taxpayer is liable to pay the tax on the whole of the land as legal owner. The whole legal estate in the land is assessable primarily. Sec. 25 in no way confines the assessment of tax to the interest of the life tenant. It merely grants a concession with regard to the assessment of the life tenant's interest. If the trustee is not liable to be assessed as if he were beneficially entitled to the whole of the land, there will be many cases in which the whole taxable value of the land will disappear. The basis of taxation under sec. 25 is the hypothetical best rent obtainable for the land, and not the value of the beneficial interest which the life tenant has in the land. Sec. 25 is controlled by sec. 33. The proviso to sec. 33 shows that the trustee's liability is not limited to the interest of any one *cestui que trust*. He is the primary taxpayer for the aggregation of interests comprised in his trust. Then under sec. 62 power is given to the trustee to recover the tax from the persons on whose behalf he has paid it.

[GRIFFITH C.J.—But he cannot recover it from the remaindermen, because the Act makes the tenant for life the sole owner, and does not make the remaindermen liable. Calling the trustee and the tenant for life primary and secondary taxpayers does not make the tax payable twice over.]

Where beneficial owners are under the same trust, their liability can be aggregated, and the trustee is primarily liable for all; *Commissioner of Taxes* v. *Joseph's Trustees* (1).

[GRIFFITH C.J.—That is contrary to sec. 33 of the Act].

If the trustee cannot recoup himself from the share of any individual beneficiary, he can get back the tax by a charge on the estate. Sec. 62 does not exempt the trustee from paying the tax on the whole land. It merely exempts him from personal liability. Sec. 25 (1) does not say "to the exclusion of any other person than the life tenant." The proviso to sec. 25 (1) can only apply

(1) 27 N.Z.L.R., 1085.

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to a legal tenant for life, because it speaks of a tenant for life "without power to sell" which is a power which only the trustee would have. By sec. 38 (2) joint owners are assessed as one person, which is exactly analogous to taxing the trustee as sole owner.

Owen K.C., in reply. Sec. 25 refers to both legal and equitable tenants for life. The primary taxpayer is responsible for nothing more than what the secondary taxpayer is assessable for. The trustee is entitled to the same deductions as his *cestui que trust* is entitled to.

GRIFFITH C.J. The first question submitted for determination in this case arises upon the construction of sec. 25 of the *Land Tax Assessment Act*. The scheme of that Act is to tax the owner of land in respect of the unimproved value of his land, with a statutory deduction in each case of £5,000 from the gross value.

Sec. 25 declares as follows:—

"(1) The owner of any freehold estate less than the fee-simple shall be deemed to be the owner of the fee-simple, to the exclusion of any person entitled in reversion or remainder."

These words are perfectly plain and distinct: there is nothing ambiguous about them. The provision is that, when there is a freehold estate less than the fee simple, such as an estate for life, the owner of that estate is to be deemed to be the owner of the whole fee-simple, and the person entitled in reversion or remainder is to be left out of consideration, and is not to be regarded as owner in any sense.

Then follows a proviso dealing with cases where the estate for life had been created before 1st July 1910, from which date the Act practically operates. The proviso is:—"Provided that, for the purpose of the assessment of a tenant for life of land, without power to sell, under a settlement made before the first day of July, One thousand nine hundred and ten, or under the will of a testator who died before that day, the unimproved value of the land shall be calculated" upon the basis prescribed, as to which no question arises here.

The proviso goes on to define the term "tenant for life" as used

in the section as follows:—"A tenant for life includes . . . a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life."

That is to say that an equitable tenant for life is put on precisely the same footing as a legal tenant for life. In the case of a legal tenant for life with estates in remainder, the section says that the legal tenant for life shall be treated as the only owner in respect of the land, and that the owners of the estates in remainder shall be disregarded altogether for the purposes of taxation. The words I have just read say in the plainest way that that rule is to apply equally in the case of an equitable tenant for life with equitable remainders. The facts in each of the present cases are that there was a will made by a testator who died before 1st July 1910, and the appellants are the trustees under the will. In each case the testator devised his property upon trust to pay the income to his widow for life, and after her death to divide the property amongst children. The cases fall therefore within the very words of the proviso. There is an equitable tenant for life, and there is no suggestion of any power to sell. The consequence is that the equitable tenant for life is to be deemed to be the owner of the fee-simple, and the persons entitled in remainder are to be left out of consideration. All that remains is to calculate the unimproved value of the land upon the basis laid down in the proviso to sec. 25.

All this seems so clear that it merely needs to be stated. But an argument is set up on behalf of the Commissioner which I have done my best to follow, although I am not sure now that I understand it. I will endeavour to state it. Reliance is placed upon secs. 33 and 35. Sec. 33 deals with the case of trustees, and says:—"Any person in whom land is vested as a trustee shall be assessed and liable in respect of land tax as if he were beneficially entitled to the land." These words, again, seem to me quite unambiguous. For the purpose of the assessment of land the trustee stands in the place of the *cestui que trust*. He does not incur a different and independent liability. He is liable in the same way as if he were the person beneficially entitled: no more and, generally speaking, no less. The contention for the Commissioner, however, is that, where land is held on trust, the

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trustee is to be taxed in respect of the whole unimproved value of the land whether the beneficiaries are liable to pay tax or not. It would be a very singular result if the trustee should be bound to make an expenditure out of the trust funds for the *cestui que trust* which he is declared to be not liable to pay. As I have said, the plain meaning of the section is that the trustee stands in the place of the *cestui que trust*.

Then reference is made to sec. 35, which deals with the case of what are called primary and secondary taxpayers. It reads:— "Subject to this Act, the owner of any equitable estate or interest in any land shall be assessed and liable in respect of land tax as if he were the legal owner of the estate or interest; and the owner of the legal estate shall be deemed to be the primary taxpayer, and the owner of the equitable estate is to be the secondary taxpayer; and there shall be deducted from the tax payable by the latter in respect of the land such amount (if any) as is necessary to prevent double taxation." That says plainly enough that the primary and secondary taxpayers are liable in respect of the same sum. The person owning the legal estate is called the primary taxpayer because, for one reason, if the land tax is not paid it becomes a charge upon the land, and is a charge upon the land in the hands of the legal owner. But they are both liable in respect of the same tax. The Commissioner contends that the liability of the trustee, the legal owner, as a primary taxpayer may exceed the total amount paid by all the secondary taxpayers. That argument is quite inconsistent with sec. 33, the first proviso in which says that where a trustee "is the owner of different lands in severalty, in trust for different beneficial owners who are not for any reason liable to be jointly assessed, the tax so payable by him shall be separately assessed in respect of each of those lands." The total amount of the liability of the trustee is therefore the aggregate amount of the separate assessments.

There is one exceptional case in which the amount of the primary taxpayer's liability may be less than the aggregate amount of the separate assessments. This is dealt with in sec. 43, to which it is not necessary to refer. It provides for an exceptional case, and has no bearing on the present question.

Sub-paragraphs (*d*), (*f*) and (*g*) of sec. 62, which are also referred

to on behalf of the respondent, confirm the view I have expressed, if there were any doubt or room for argument. Sub-paragraph (*d*) provides that when a trustee pays land tax he may reconp himself out of funds in his hands belonging to "the person in whose behalf he paid it." Sub-paragraph (*f*) provides that the trustee is "personally liable for the land tax payable in respect of the land if while the tax remains unpaid he alienates charges or disposes of any real or personal property which is held by him in his representative capacity, but he shall not be otherwise personally liable for the tax." The words "held by him in his representative capacity," of course, mean held by him as trustee for the person who is liable to the tax, and not held by him in his representative capacity as trustee for another person.

Sub-paragraph (*g*) authorizes the trustee to "raise whatever moneys are necessary in order to pay the land tax by mortgage or charge with or without power of sale of any real or personal property held by him as such trustee, and may apply the money so raised or any other moneys in his possession as such trustee in paying the tax." Of course, that means that the amount of the tax may be raised out of the real and personal property of the *cestui que trust*, and not that of someone else. Otherwise this would be an extraordinary scheme by which, when several persons had the misfortune to have their property in the hands of a single trustee, the property of one might be taken to pay another's debts. Such a law might be made, I suppose, by Parliament, but we should expect to find very clear words to express such an intention. It appears to me that these sections have no bearing at all on the matter except as confirming what may be called the *primâ facie* view, that a man is to bear his own burden and not that one person is to be liable for another's debt. The *primâ facie* and obvious construction is therefore the right one. Sec. 25 contains the only provision applicable to the case. The only person to be regarded as owner is the tenant for life, and the trustees of the estate are only liable to be assessed for the amount payable by the widow as such life tenant. The first question will therefore be answered in the second alternative, and it becomes unnecessary to answer the second. The assessments should be reduced in conformity with this opinion.

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O'CONNOR J. read the following judgment:—I am of the same opinion. The matter is so plain that I doubt whether anything can be usefully added to what my learned brother the Chief Justice has said; but, as it is evident that the question is of some importance in the administration of the Act, I will state concisely my reasons in my own way.

There is no doubt that, for the purposes of the Act, the trustee is the owner of the land, as well as the *cestui que trust*. The tax is made payable on the amount of the unimproved value of the land owned by a taxpayer. As a trustee may be an owner and taxpayer it is contended by the Commissioner that, according to the scheme of the Act, the tax may be imposed either on a trustee or on a *cestui que trust*, that is to say, on the owner of the legal estate or on the owner of the equitable estate. Mr. *Piddington*, for the Commissioner, contends that, in this case, the tax must be paid by the owner of the legal estate. Now, in many instances it would make no difference to the amount of the tax whether the legal owner or the equitable owner were made the taxpayer. But in this case the distinction is very material, because the case of a tenant for life with estates in remainder has been expressly dealt with by sec. 25. If the equitable estate is looked at, sec. 25 enacts, as plainly as words can enact anything, that in estimating the tax in that case the owner of a life estate is to be taxed for the whole of the unimproved value of the land in fee-simple, and the person entitled in reversion or remainder is to be left out of consideration altogether. In that special case, therefore, the Act declares, looking upon the *cestui que trust*, that is to say, the beneficial owner, as the taxpayer, that, in respect of any land so held, the owner of the life estate shall pay tax on the fee simple and the remainderman shall not be liable to the tax. If, however, the trustee is to be deemed the owner, his liability will cover the whole of his estate, which is the unimproved value of the fee-simple without any deduction whatever. It would include not only the value of the life estate but also the value of the estates of the persons entitled in remainder.

The question in this case is, whether the trustee, or the *cestui que trust*, who is life tenant, is to be taken as the owner. Is the tax imposed on the land as held by the trustee, thus imposing

through him liability on the persons entitled in remainder, or is it imposed as specifically enacted in sec. 25 only on the person equitably entitled to the life estate? I have no doubt whatever that on the plain words of the Act it is impossible to hold that, in respect of this land, there is any other liability to the tax than that imposed upon the tenant for life. The words of the Act which impose liability on a trustee must be read in the light of sec. 62, which declares what the responsibility of the trustee really is. Sub-sec. (*a*) of that section provides that the trustee shall be answerable as a taxpayer for the doing of all such things as are required to be done by virtue, and in respect, of the land held by him in his representative capacity, and the payment of land tax thereon. Sub-sec. (*f*) provides that he is personally liable for the payment of the land tax:—"If while the tax remains unpaid he alienates charges or disposes of any real or personal property which is held by him in his representative capacity, but he shall not be otherwise personally liable for the tax." Sub-sec. (*g*) then authorizes him, when he has paid the tax, to recover the amount from the person on whose behalf he has paid it, or to deduct it from moneys in his hands belonging to that person.

The liability of the trustee is thus a liability to pay a tax for which the beneficial owner is liable. There cannot be a primary liability on the trustee, which is not a secondary liability on his *cestui que trust*. In other words, in cases where the Act relieves the *cestui que trust* from liability, his trustee must also be taken to be relieved. The test in this case would be this: If the trustee had to pay the tax how could he recover it from the remainderman, in face of the provisions of sec. 25? How could he justify a payment on behalf of his *cestui que trust* by any section of the Act? In a case of this kind where the liability of the *cestui que trust* is definitely fixed, as it is by sec. 25, it is impossible to add to that liability by calling in aid the general provisions of the Act imposing liability on trustees. Therefore I agree that the only question which is material must be answered as proposed by my learned brother the Chief Justice against the contention of the Commissioner.

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After the judgment of the Court the matter stood over at the request of both parties in order that the amount of tax payable under the judgment might be calculated. Subsequently, on 14th September, the Governor-General certified that the following regulation under the *Land Tax Assessment Act* 1910 should, on account of urgency, come into immediate operation as a provisional regulation:—

"Regulation No. 51 of The Land Tax Regulations 1911 (Statutory Rules 1911, No. 8) is amended—

"(*a*) by omitting the paragraph reading 'The value under (*a*) and (*c*) shall be calculated on the basis of 4½ per cent. under Tables II. and III.,' and inserting in its stead the following paragraph:—

"'The value under (*a*) shall be calculated on the basis of 4½ per cent. under Table I. for a period of 100 years, provided that if the value thus obtained exceeds the unimproved value of the land, the value under (*a*) shall be the unimproved value of the land'; and

"(*b*) by inserting at the end thereof the following new paragraph:—

"'The value under (*c*) shall be calculated on the basis of 4½ per cent. under Tables II. and III.'"

Fresh assessments of the tenant's for life having been made under this amended regulation, on 4th October the question of the assessment was mentioned before *Griffith* C.J.

Owen K.C. and *Thompson*, for the appellants Sendall and Chisholm.

Knox K.C. and *Bethune*, for the appellant K. M. Crace.

Piddington and *Browne*, for the Commissioner, admitted that the regulation of 14th September was *ultra vires* and invalid.

GRIFFITH C.J. I think I ought to give judgment in this case on the basis on which it stood when it was referred to the High Court and decided by them. The Court decided that trustees

were liable to be assessed at the amount which the *cestui que trust* was liable to be assessed at; no more and no less. In both these cases the *cestui que trust*, the tenant for life, sent in returns, in the one case the value was £15,211, and in the other £16,765, both of which were accepted by the Commissioner, and the decision of the Full Court was in substance that the trustees, the appellants in each case, should be assessed on those sums respectively. I was about to give judgment to that effect on 25th August, but was asked by the parties on both sides to let the matter stand over for a day or two as there might be some difficulty in calculating the exact amounts, which were to be sent to me in Chambers. I did so.

Since then what I may call an extraordinary event has occurred. The assessment of the tenants for life has been made by the Commissioner in pursuance of a regulation, the validity of which it was not to be expected would be impeached by himself, but since then, since the judgment of the Court was pronounced, a new regulation has been made, purporting to lay down an entirely different basis of calculation and declaring, in effect, that the value of an estate for life is one hundred years' purchase at $4\frac{1}{2}$ per cent. It seems surprising. The minimum amount upon which a tenant for life is to pay under this regulation is the full unimproved value of the fee-simple.

Sec. 25 was apparently introduced to give a benefit to the life tenant under instruments executed earlier than 1st July 1910. But according to this new proposed regulation it is to work a detriment, and under no circumstances can it be a benefit. It seems remarkable that, pending an accidental delay at the request of the parties in giving formal judgment, one of the suitors should endeavour to alter the rights of the parties by an arbitrary proceeding of this sort. Mr. *Piddington* very properly does not try to defend the regulation, but I am justified in referring to this extraordinary procedure to anticipate a judgment of the Court.

I think, further, that the regulation cannot have a retrospective effect with respect to a liability which had accrued before it was made, and that is an additional reason why no effect should

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be given to it. Moreover, the regulation is, on the face of it, absurd and *ultra vires*. Then the question is, what is to be done?

The tenants for life have been already assessed. I am told that, pending this litigation they have been re-assessed. If they have, then I will let the Commissioner stand upon his right on the re-assessment, but it is my duty to say what amount the trustees should be assessed upon under the assessment from which the appeal is brought, and I think I ought to go upon the facts as they were represented to the Court by counsel on both sides when the case came on. I therefore direct that the assessment in Sendall's case is to be on an estate of the unimproved value of £15,211, and in Crace's case of the unimproved value of £16,765. The amount payable on these sums is a mere matter of calculation. Of course the values will be subject to the statutory deduction in each case.

I was asked to express my opinion as to the proper construction of sec. 25. As at present advised I am very strongly disposed to think that the expectancy of the tenant for life is not a material element for the reason which I intimated during the argument. The tenant for life gets the full benefit of the rent of the land, and the tax, which is an annual charge, may be fairly regarded as a charge against that rent, so that the fact that the tenant for life is likely to live for a long or a short period is not material on the question of what contribution he should make to the revenue out of the rent received from year to year. The rent should be capitalized at so many years' purchase according to circumstances. That is my present impression.

In the present case the difference between the amounts payable by the trustees on behalf of the tenant for life on that basis and the amount I formally award would not amount to more than a few pounds, so that it is not necessary to refer the matter to the Full Court or to give a formal decision upon it. For the reasons I have given I pronounce judgment on the matters as they stood when the case was adjourned for the convenience of the parties. I accordingly reduce the assessment to £10,211 in Sendall's case, and to £11,765 in Crace's case. The Commissioner can make a

fresh assessment if he likes. The respondent must pay the costs of appeal in both cases.

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Appeal allowed.

Solicitors, for the appellants, *Vindin & Littlejohn*; *Macnamara & Smith.*

Solicitor, for the respondent, Crown Solicitor for the Commonwealth.

C. E. W.

Appl *Hazlett* v *Presnell* 149 CLR 107

Appl *Hazlett* v *Presnell* 56 ALJR 884

Foll *Mulgrave Shire Council, Ex parte* (1989) 41 APA 169

Foll *Brenner* v *First Artists' Management Pty Ltd* [1993] 2 VR 221

Aff *South Australia* v *Victoria* (1914) 18 CLR 115

Appl *Abebe* v *Commonwealth* (1999) 162 ALR 1

Appl *Abebe* v *Commonwealth* (1999) 55 ALD 1

Cons/Appl *Hooper* v *Kirella Pty Ltd* (1999) 47 IPR 21

Cons *Truth About Motorways* v *Macquarie Infrastructure* (2000) 200 CLR 591

[HIGH COURT OF AUSTRALIA.]

THE STATE OF SOUTH AUSTRALIA . PLAINTIFFS;

AND

THE STATE OF VICTORIA . . . DEFENDANTS.

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MELBOURNE, *February* 20, 21, 22, 24, 25, 27, 28; *March* 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21; *May* 22.

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

Jurisdiction of High Court—"Matters between States"—Dispute as to boundary between States—Boundary fixed by Imperial Statute—Authority of Governors to mark boundary on the ground—Effect of marking—4 & 5 Will. IV., c. 95—The Constitution (63 & 64 *Vict., c.* 12), *sec.* 75.

The "matters" between States, in respect of which original jurisdiction is by sec. 75 of the Constitution conferred on the High Court, are matters which are of a like nature to those which can arise between individuals and which are capable of determination upon principles of law.

Therefore, the boundary between two States having been fixed by an Imperial Act of Parliament before federation,

Held, that the High Court had jurisdiction to entertain an action by one of these States against the other seeking a declaration that certain land adjoining that boundary and in the *de facto* occupation of the latter State formed part of the territory of the former State.