[HIGH COURT OF AUSTRALIA.]

MILLARS' KARRI AND JARRAH COMPANY (1902) LIMITED . . . . } APPELLANTS;

AND

THE HARVEY DISTRICT ROAD BOARD . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Nov.* 6, 11.

Griffith C.J., Barton and Higgins JJ.

Rateable property—Timber leases—Owner—Occupier—Liability to be assessed and rated—Land Act 1898 (*W.A.*) (62 *Vict. No.* 37), *secs.* 112-124—*Land Act Amendment Act* 1899 (*W.A.*) (63 *Vict. No.* 50), *secs.* 3, 9—*Roads Act* 1911 (*W.A.*) (*No.* 29 *of* 1911), *secs.* 5, 194, 196, 199.

Sec. 112 of the *Land Act* 1898 (which comes under the heading "Timber Leases") as amended by the Act of 1899, provides that the Minister may grant leases giving the lessee the exclusive right to cut, remove and sell jarrah or any other kind of timber specified in the lease at the rental and on the conditions prescribed; and sec. 9 of the Act of 1899 prescribes the form of such leases.

By sec. 5 of the *Roads Act* 1911 the word "occupier" includes any person who, under a licence or concession relating to any specific land belonging to the Crown, has the right of taking any profit of the land; and the word "owner" as applied to land means, *inter alia*, any person who, under a licence or concession relating to any specific Crown land, has the right of taking any profit of the land.

Sec. 194 of the last-mentioned Act provides that all Crown land is "rateable property" if it is not used for public purposes or unoccupied.

Sec. 199 of the same Act is as follows:—"The capital unimproved value of land held under lease, licence, or concession from the Crown for cutting and removing timber, or with the right of taking any other profit from the land, shall be a sum equal to twenty times the annual rent (including royalties, licence fees, and other similar payments) reserved by the lease, licence or concession."

Held, that land in respect of which a "timber lease" has been granted is rateable property within the meaning of the *Roads Act* 1911, and the "lessee" is liable to be assessed and rated therefor; and that the rate of assessment is that prescribed by sec. 199 of that Act.

Decision of the Supreme Court of Western Australia affirmed.

APPEAL from the Supreme Court of Western Australia.

The appellant company, who are the holders of several timber leases from the Crown, appealed against assessments for rates made in respect of them by the respondent Board. The magistrate of the Local Court at Bunbury, before whom the matter originally came, by request of the parties, stated a special case asking the direction of the Supreme Court on the following questions :—

(1) Are the areas over which the appellants have a right to cut, remove, and sell timber rateable land for which the appellants are liable to be assessed upon and pay rates under the *Roads Act* 1911 ?

(2) If rateable, should the assessment be made under secs. 195 and 196 or sec. 199 of the above Act ?

The Supreme Court answered the first question in the affirmative; and held that the assessment should be made under sec. 199.

From this decision the company now appealed to the High Court.

Draper K.C. and *F. M. Stone*, for the appellants. By sec. 124 of the *Land Act* a pastoral lease may be granted over land held as a timber lease; so that the company have not the exclusive possession, but are liable to interruption from the public and from the pastoral lessee, and do not come within sec. 199.

The land is to be valued according to the rate book, and land excepted from taxation is to be inserted in the rate book once only, unless there is a special provision stating that it is to be entered twice. The *Roads Act* 1911 does not provide for dual occupation for rating purposes.

Crown land such as this is, is not rateable so long as it is "unoccupied." In rating Statutes the word "occupier," since the time of Elizabeth, in the *Poor Law Statutes*, has always had its

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technical meaning: *The King* v. *The Trent and Mersey Navigation Co.* (1); *Mogg* v. *Overseers of Yatton* (2); *Smith* v. *Lambeth Assessment Committee* (3).

Where the same piece of land is held by two persons, by one as a pastoral and by the other as a timber lessee, it was not the intention of the legislature to tax the same land twice. The tax can only be imposed upon those people who are clearly indicated in the Act. The appellants are rated at three-fifths higher than if they had the absolute freehold.

They have not got an estate in the land: *Doe* v. *Wood* (4). Such a license was intended as is set out in *Bythewood and Jarman's Conveyancing*, 4th ed., vol. iii., p. 619.

Northmore K.C. and *Durston*, for the respondents. The lease is physically land, and it is occupied land within the definition of occupier, and the appellants are the owners.

Cur. adv. vult.

November 11.

The following judgments were read :—

GRIFFITH C.J. My difficulty in this case is to find the puzzle. The *Land Act* 1898 contains a group of sections, numbered 112 to 124, under the heading "Timber Leases." Sec. 112, as amended by an Act of the following year, provides that "the Minister may grant leases giving the lessee the exclusive right, subject to this Act . . . and to the Regulations . . . to cut, remove, and sell . . . jarrah, . . . or any other kind of timber specified in the lease . . . at the rental and on the conditions hereinafter prescribed." Sec. 9 of the later Act prescribed a form of timber lease, which is headed with these words, and witnesses that the Minister in exercise of the powers of the *Land Act* 1898 grants and demises to the lessee "the sole and exclusive right . . . to cut remove and sell" the timber specified in the First Schedule standing or growing upon the land described in the Second Schedule, with certain other rights to be exercised over the land. Those rights, however, did not amount to a right of exclusive occupation. Sec. 124 of the *Land Act* expressly pro-

(1) 4 B. & C., 57.
(2) 6 Q.B.D., 10.
(3) 10 Q.B.D., 327.
(4) 2 Barn. & A., 724.

vides that a pastoral lease may be granted over "any land held as a timber lease" and a timber lease may be granted over any land held as a pastoral lease.

The appellants are the holders of several of these instruments called "Timber Leases," and have been assessed by the respondents in respect of the land comprised in them under the provisions of the *Roads Act* 1911, by which Road Boards are created for country districts with large powers of rating.

By sec. 5 of that Act the word "occupier" includes any person who, under a licence or concession relating to any specific land belonging to the Crown, has the right of taking any profit of the land; and the word "owner" as applied to land means, *inter alia*, any person who under a licence or concession relating to any specific Crown land has the right of taking any profit of the land.

Rates are payable by the owner.

The group of secs. 195 to 208 relates to the valuation of rateable land. The basis of rating is the unimproved capital value. Sec. 196 deals with freehold lands and, except as afterwards provided, lands held under lease from the Crown without the right to acquire the fee simple. Sec. 198 deals with land held under lease from the Crown for pastoral purposes and used for such purposes only. Sec. 199 is as follows:—"The capital unimproved value of land held under lease, licence, or concession from the Crown for cutting and removing timber, or with the right of taking any other profit from the land, shall be a sum equal to twenty times the annual rent (including royalties, licence fees, and other similar payments) reserved by the lease, licence, or concession."

Apart from any technical meanings attached to words in conveyancing law, it would seem apparent that the words "land held under lease from the Crown for cutting and removing timber" were intended to mean, and aptly described, lands which are the subject matter of the instruments described in the *Land Act* as "Timber Leases." But the appellants contend that this is a mistake. They say that the so-called "Timber Leases" are not leases at all in the technical sense of that term, since they do not create any estate in the land itself, or confer any exclusive right of occupation, and that the word "held" connotes a tenure

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of an estate in land. They also contend that at common law exclusive occupation is the necessary condition of rateability. Admitting these premises, it does not follow that the legislature in sec. 199 used the words "lease" and "held" in their technical conveyancing sense. Our duty is to say what the legislature meant by their language, and it is manifest that in the *Land Act* of 1898 they thought fit to describe these documents as leases—which is certainly a convenient term of description, and one not likely to be misunderstood by any plain person—and in sec. 199 of the *Roads Act* adopted that designation. They were also free to use in both Acts (as they did) the word "held" to describe the nature of the rights enjoyed by the grantees of the so-called leases.

In my opinion the words of sec. 199 are exactly and literally applicable to the documents in question, and the appellants are rateable on the basis prescribed by that section.

Even if the documents are not leases but licences, the appellants are in no better position. For, in that view, the documents are licences relating to specific land belonging to the Crown under which the appellants have a right of taking a profit of the land, so that they are both "occupiers" and "owners" of the land within sec. 5, and rateable under sec. 199 as holders of land under licence for cutting and removing timber.

In my opinion, therefore, the areas in question are rateable land for which the appellants are liable to be assessed and rated, and the assessment should be made under sec. 199.

The appeal must, therefore, be dismissed.

BARTON J. This is a case stated by the magistrate of the Local Court at Bunbury under sec. 229 of the *Roads Act* 1911 for hearing and determination by the Supreme Court, from whose decision, which was adverse to its contentions, the company now appeals.

The controversy arises upon the assessment by the respondent Board, acting under the *Roads Act*, of certain areas of Crown lands over which the appellant company has a right, conferred by documents called "Timber Leases," to cut, remove and sell certain kinds of timber. These documents were issued to the com-

pany by the Minister for Lands under the authority of the Land Acts of this State. See secs. 112 and 113 of the Act of 1898 as amended. The documents are in the form prescribed by the Acts and Regulations, and a specimen is appended to the case stated. One of them is dated 15th April 1905, and we are left to infer that all of them have been issued since the Amending Act of 1902. The Board has rated the company in an assessment of £400 for every 640 acres of the land the subject of the "Leases," being 20 times the annual "rent" reserved thereby. The company protests that it is not rateable at all, and that, if it is liable, the assessment is erroneously based on sec. 199 of the *Roads Act* instead of sec. 196 (a).

I will first consider the nature of the rights granted to the company by the documents in question. Each of them is headed "Timber Lease." By each the Minister purports to grant and demise to the company (called the lessee) "the sole and exclusive right," subject to the Act and Regulations, "to cut, remove, and to sell any kind of timber as defined in the First Schedule . . . standing or growing upon the land described in the Second Schedule . . . ," and there are also granted, as incidents, the rights to bore and sink wells in the lands, and to construct railways and tramways on and through the lands. *Habendum* to the lessee for the term of 21 years at the "yearly rent" specified. The lessee covenants duly to pay the yearly "rent reserved," to erect within two years a sawmill plant of the character and power defined and maintain it throughout the term; and to yield up the land to the Minister "at the expiration or sooner determination of the said term." There are other covenants which need not be quoted. The rights of the public to go upon and travel over the land and to cross any railway or tramway thereon, without interruption by the "lessee," are expressly recognized, but so that the public do not trespass on or injure any house or building, plant, timberyard, well, garden, or cultivated land. The Minister reserves the right to cut and clear tracks across the land, make crossings over any railway or tramway of the lessee, and take indigenous timber and any material required for making or repairing works of public utility without compensation to the lessee. He also reserves the right to resume

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any part of the land for purposes of public utility or convenience or for granting powers to mine, without making the lessee any compensation other than a return or reduction of rent proportioned to any land resumed on which marketable timber is growing or standing. That is to say, when no such timber remains, there is not to be even an allowance of rent. And "subject as aforesaid" the Minister covenants for quiet enjoyment of "the premises."

It should be mentioned here that by sec. 124 of the *Land Act* "a pastoral lease may be granted over land held as a timber lease, and a timber lease may be granted over land held as a pastoral lease." A pastoral lease expressly demises to the lessee "the natural surface" of the land leased (see Twenty-fourth Schedule), a form of grant which may be contrasted with the right to cut, remove and sell timber given by the timber lease.

Now, I am of opinion that this document does not confer any estate in the 75,000 acres of land, the subject of it. It calls itself a "timber lease," it calls the grantee the "lessee," it professes to "demise" the right which it confers, and it describes the payment for the grant as a "rental," and the time for which the right is to endure as a "term." Not all these things together avail to create an estate in face of the substance of the document. What is granted for a specified period is not the land itself, even nominally. It is the exclusive right to cut, remove and sell the specified timbers, together with certain other rights which are only auxiliary to the privilege agreed for. So far as they give any right to occupy fractional parts of the area it is only for the purpose of rendering the grant of the mere privilege effective. There is nothing more than a *profit à prendre*. Supposing the company to have "cut out" all the marketable timber on one of these areas, what right over the soil itself would it be entitled to exercise? It could not sublet the soil any more than it could have done so while the timber stood; and the timber, in virtue of which alone it had a right to be there, would have vanished. Its "exclusive" right entitles it to exclude others from exercising similar rights over the same area. I do not think it is entitled to exclude the Crown, except perhaps so far as is necessary to the enjoyment of the privilege contracted for. Let us turn to the

Land Act itself. Sec. 112 does not empower the Minister to give more than the exclusive right to cut, remove and sell "any kind of timber" (Act of 1898) or "any . . . kind of timber specified in the lease" (the amended form). True, the Act as well as the indenture calls the document a "lease" and its recipient the "lessee," but it is only a lease of a privilege. The fact is that the Act empowers the Minister to grant several kinds of licences with respect to timber and bark (secs. 110 and 111), and the right issued under sec. 112 is called a "timber lease" to distinguish it from these other licences, being a right of much greater fixity. The nomenclature appropriate to a lease of land is adopted for convenience merely, and it would be out of reason to say that its mere use converted a grant of a licence into an estate in land, even only for years. The transaction which was the subject of the case of *Smith* v. *Lambeth Assessment Committee* (1), was in its essentials similar to the grant allowed by the *Land Act*, save that the one was a grant of an easement and the other is a grant of a different kind of privilege, but still a privilege. See also *Melbourne Corporation* v. *Howard Smith Co. Ltd* (2).

But the appellant company relies on the cases of which *Smith* v. *Lambeth Assessment Committee* (1), is an example, because it was there decided that the grant of the privilege in debate, which Mr. *Draper* admitted, or rather on that branch of his argument contended, was like that now in question in that it fell short of a chattel interest in land, did not confer an exclusive occupation, which was an essential to the liability of the lands, the subject of the grant, to be rated. Therefore, he argues, there is no such occupancy here, and these timber areas cannot be rated. By sec. 194, he points out, all land is made rateable property within the meaning of the Act, with certain exceptions. The first of these is: "Land the property of the Crown and used for public purposes, or unoccupied;" and we are pressed to say that, in view of the authority just cited and other cases, this land, not being the subject of exclusive occupation, is not rateable property. This would be a formidable objection but for other terms to be found in the Act. The Statute does not define "unoccupied," nor "occupation." But it says in sec. 5 that "'Occupier'

(1) 10 Q.B.D., 327. (2) 13 C.L.R., 253.

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. . . includes . . . any person who, under a licence or concession relating to any specific land belonging to the Crown, has the right of taking any profit of the land." That description exactly fits the holder of such a right as these timber leases confer. If, then, the company is an "occupier," and it must be one if the definition means anything, the land is not "unoccupied" within sec. 194 (1), and is, therefore, not within the exception relied on, and moreover the land is, within the meaning of the Act, so occupied as to be rateable.

Secs. 230 and 232 (1) were referred to. The first-named provides that the amount of any rates made and levied under the Act shall be payable by the rateable owner. Sec. 232 (1) provides that the rateable owner for the period for which a rate is made is the person who at the completion of the rate book is the owner of the land. Who then is the "owner" of the land for the purposes of the Act? Sec. 5 tells us, and the parts of the definition of "owner" marked 1 (b) and 2 (b) are those material to the present case. By 1 (b) "owner" as applied to land means "any person who is in possession or entitled to possession of the land, or in receipt or entitled to the receipt of rents and profits of the land, as the holder of an estate less than freehold under a lease or agreement granted or made by or with the Crown." It was urged that if the land was not "unoccupied" the alternative was such an exclusive occupancy as connoted an estate in the land, and, therefore, that the company was rateable as such an owner as just described, in which event he was, if liable at all, only assessable on the capital unimproved value under sec. 196 (a). But from what I have said as to the nature of the right conferred by a "Timber Lease" under the Land Acts it will be apparent that I cannot agree that the company is the holder of any estate. The only other part of the definition under which the company can come is 2 (b), by which "owner" means "any person who, under a licence or concession relating to any specific Crown land, has the right of taking any profit of the land." There again is a definition which exactly fits the company in relation to its timber areas. It is an "owner" as clearly as it is an "occupier"; it is the owner within sec. 232 (1), and by consequence, within sec. 230, the rateable owner. But it is the rate-

able owner, that is the owner of rateable land, only in respect of its licence or concession. I conclude therefore that these lands, though not in fact the subject of an exclusive occupation if the question were under the Statute of Elizabeth, are occupied within the meaning of sec. 194 (1) of the *Roads Act*, and that the company is the "owner" within the meaning of sec. 232 (1), as a person who under a licence or concession relating to specific Crown land has the right of taking a profit of the land; and further that the company is the rateable owner of the land within the meaning of sec. 230.

I now come to the sections under which the parties respectively claim that the assessment should proceed. The basis of all assessments under the Act is the capital unimproved value, but it is differently defined for varying purposes. It is sec. 199 on which the assessment is based, and it is as well to take it first. It reads thus:—"The capital unimproved value of land held under lease, licence, or concession from the Crown for cutting and removing timber, or with the right of taking any other profit from the land, shall be a sum equal to twenty times the annual, rent (including royalties, licence fees, and other similar payments) reserved by the lease, licence, or concession." The company based an argument on the words "land held." In technical law, to hold land is to have a tenure. If there was a tenure, it was urged, there was an estate, and therefore sec. 196 (a) was applicable. But this argument would deny any efficacy whatever to sec. 199; for, if it is adopted, a mere licence becomes a tenure, and if all rights from the fee downwards to mere licences are to be considered as estates or tenures, and therefore to be assessable under sec. 196, there is nothing on which sec. 199 could operate. Of course, the legislature could never have passed that section with such an intention, nor can we read it in that way if any other reasonable construction is open. The words "land held" in this section, like the word "lease" both in this Act and the Land Acts, when applied to the grant of a right to cut timber, are clearly used in a sense not technical. They denote land as to which a privilege called a lease, licence or concession is made grantable by the *Land Act* for cutting timber or other profit,

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and such land is for convenience' sake said to be "held" under such a grant just as a right to take timber is designated a "lease." No other meaning is possible.

Well, then, sec. 199 prescribes how the capital unimproved value of land subject to such a right or privilege is to be estimated. It is to be a sum equal to twenty times the annual "rent," as it is (still untechnically) called, "reserved" by the "lease, licence or concession." It is the owner who is rateable, and a person who, under a licence or concession relating to any specific Crown land, has the right of taking any profit of the land, such as the right to take timber, is an owner for the purposes of the Act. That, as it seems to me, is an end of the matter, and I think the company is clearly assessable under sec. 199 in respect of the lands comprised in these licences. Any other construction would amount to ignoring the section mentioned, and I fail to find any substantial reason for taking the subject matter out of that section, and placing it under sec. 196 (a).

The documents in question are, no doubt, leases within the meaning of sec. 199, though they are not leases in the sense of documents conferring an estate. But that fact only goes to confirm the liability of the company.

I should refer to one more argument used for the appellant company. It was urged that, as the pastoral lessee is an owner within the meaning of sec. 5, a decision that the company is rateable at all amounts to saying that two owners may be rateable in respect of the same land, as by sec. 124 of the *Land Act* pastoral leases may be granted over any land "held" as a timber lease, and *vice versâ*. I do not find any absurdity in such a result if it arises under a taxing enactment. Moreover, the liability is in respect of distinct and separate rights. The pastoral lessee, if rateable, is so in virtue of his pastoral occupation, and the timber lessee is rateable in virtue of his right to take a certain profit of the land, which right he can hold as against the pastoral lessee. There is nothing absurd or even inconsistent in that.

On the whole case, then, I am of opinion that the learned Judges of the Full Court decided rightly, and that the appeal must be dismissed.

HIGGINS J. The case stated for the opinion of the Supreme Court of Western Australia, raises a question as to the interpretation of the *Roads Act* 1911, and in particular of sec. 199. The appellants hold timber leases granted under the *Land Act* 1898 (and amendments thereof); and the Road Board has assessed the capital unimproved value as under sec. 199, that is to say, at 12s. 6d. per acre. The appellants object to the assessment as being too high, and urge that sec. 199 does not apply to the land. That section says:—"The capital unimproved value of land held under lease, licence, or concession from the Crown for cutting and removing timber, or with the right of taking any other profit from the land, shall be a sum equal to twenty times the annual rent (including royalties, licence fees, and other similar payments) reserved by the lease, licence, or concession." It is contended for the company that the instrument under which it cuts timber on these lands is not really a lease, but a mere licence; that the company does not "hold" the land in the technical sense, that it has not "possession" of the land in the technical sense. But the intention of the legislature has to be found from the language it uses, whether that language is used with the precision of conveyancers or not. The legislature has power to use conveyancing language in a novel sense, if it choose to do so; and here the legislature has chosen to treat the "timber lessee" as holding the land, and even as having "possession" of the land. In the form of lease, as prescribed by sec. 9 of the *Land Act Amendment Act* 1899, the Crown "grants and demises" the sole and exclusive right to cut, remove and sell timber, with the right to bore and sink wells, the right to construct tramways and haul timber, and to connect with railways. There is also in the form of lease the usual *tenendum*, or holding clause, "to hold unto the lessee" for a term specified, "yielding and paying" the stipulated "rent reserved"; the Minister is to be at liberty by agents, &c., to enter upon and inspect the premises; there are provisoes allowing the public to cross any tramways of the company, not trespassing on any buildings, sawplant, &c., wells, gardens or cultivated land; allowing the Minister or persons authorized by him to cut tracks, make crossings, cut and take timber, stones, &c. The Minister is authorized to

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"resume and enter upon *possession*" of any part of the land required for public purposes; and persons appointed by the Minister may enter the land for the purpose of replanting with trees (sec. 120 of the *Land Act* 1898 as amended). Under sec. 121, if the lessee surrender all or part of a timber lease, he may, with the approval of the Minister, "*retain possession of and use*" lands on which are erected buildings, sawmills, &c. Several of the provisions in favour of the public and of the Minister would be unnecessary, if the lessee were not treated as, in a sense, holding the land and in possession of the land. These timber leases give exclusive rights in respect of specific lands; the timber licences give rights in respect of lands in a locality named (sec. 110), and are usually, if not always, non-exclusive; the timber licences contain no words of leasing, no reference to holding or possession. There is, therefore, much stronger reason for urging that the holder of a timber licence does not "hold" the lands the subject of the licence; and yet sec. 199 includes in one class "*land held under lease, licence*, or *concession* from the Crown for cutting and removing timber." The concessions referred to would, I understand, include concessions to cut and remove timber granted under sec. 115 of the Land Regulations proclaimed 2nd March 1887. It is plain that the word "held" in sec. 199 is not used in the technical sense. The timber lessee, with his exclusive rights in respect of specific land, is an "occupier" as defined in sec. 5; for he either "actually occupies" the land or is "entitled to possession" in the loose popular sense; and under "occupier" is included any person "who, under a licence or concession relating to any specific land belonging to the Crown, has the right of taking any profit of the land." It would be absurd to treat a licensee as an occupier, and a lessee as not. The intention of the legislature evidently was to carry this meaning of "occupier" into its definition of "rateable property"; for by sec. 194, all Crown land is "rateable property" if it is not used for public purposes "or unoccupied."

But it is said that the rate book, showing the rateable land, and the values, must show the names of the owners (sec. 209); and that timber lessees are not owners within the definition of "owner" in sec. 5. This definition says that "owner" as applied

to land means "any person who is in possession or entitled to possession of the land . . . as . . . (b) the holder of an estate less than freehold under a lease or agreement granted by or made by or with the Crown"; or "(2) . . . (b) under a licence or concession relating to any specific Crown land has the right of taking any profit of the land." These words carry out consistently the idea that the timber lessee, with his exclusive and complex rights, is practically in possession of the land, and that even a mere licensee, holding a licence in respect of "any specific Crown land," ought to be treated as an owner as well as a timber lessee. In my opinion, the intention of the legislature, so far as regards the point raised directly by the case stated, is clear enough; and it is not for us, in these proceedings, to solve difficulties and anomalies which must occur, whatever answer we give to this question, to anyone who studies the provisions of the *Roads Act* in conjunction with the Lands Acts (*e.g.*, under the section which allows a pastoral lease to be granted over any land held as a timber lease, and *vice versâ*: sec. 124 of the *Land Act* 1898).

I concur in the judgment.

Appeal dismissed with costs.

Solicitors, for the appellant, *Nicholson & Hensman*, Perth.
Solicitor, for the respondents, *S. B. Durston*, Perth.

N. McG.