ISAACS J. I also agree that the appellant is a legal tenant for life. The contention that he is not is rested upon the *Real Property Act*, and that involves the further contention that he is an equitable tenant for life. I see no ground for holding him to be an equitable tenant for life. The contention is based, as it seems to me, upon a false analogy, which I shall presently indicate. The *Real Property Act*, in Part VII., prescribes certain rules as to dealings with land—transfers, mortgages, and incumbrances. Those are cases where a person who is a registered proprietor and has vested in him the legal estate purports to pass from himself to another that estate or portion of it. Sec. 41 applies to such a case when it says that "no instrument, until registered in manner hereinbefore prescribed, shall be effectual to pass any estate or interest in any land under the provisions of this Act, or to render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in such instrument shall pass, or as the case may be the land shall become liable as security" &c. Sec. 39 prescribes that "the Registrar-General shall not register any instrument purporting to transfer or otherwise to deal with or affect any estate or interest in land under the provisions of this Act, except in the manner herein provided, nor unless such instrument be in accordance with the provisions hereof." That obviously could not refer to a will, and, if there were no other provisions in the Act, one would be constrained to say that sec. 41 did not apply to the present case. But there are other provisions in Part XI. which deals with transmissions. Now transmissions are a subject of a totally different nature. A transmission is where an estate passes by operation of law—at all events a transmission referred to in this Act, such as a transmission on bankruptcy, insolvency, death or marriage,—and the prohibition against an instrument passing an estate has no application to the case of an event, not being an instrument, having a legal operation and an estate passing, not by virtue of an instrument, but by operation of law.

It must not be forgotten that the whole scheme of this Act is based fundamentally on the Merchant Shipping Acts of England, and a distinction between transfers by acts of the parties and

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transmissions by operation of law has been established for over a century in regard to merchant shipping. The distinction is pointed out in *Chasteauneuf* v. *Capeyron* (1). In my opinion the appellant could not be called an equitable tenant for life for this reason, that in ordinary cases an equity arises, not by the execution of an instrument of transfer, but by virtue of a relationship between the parties created in some other way—by contract, or declaration of trust, or something of that sort. It is not the instrument that makes a man an equitable tenant, but it is a relationship otherwise created, the instrument being to effectuate that purpose. But in this case no other relation existed but that created by the will, and the law comes in and says that the appellant, the person to whom the use is given, is the owner of the property.

With regard to the case of *Little* v. *Dardier* (2), I express no opinion upon it, and I should need further consideration before doing so.

POWERS J. I agree that the appellant is entitled to be assessed as legal tenant for life.

First question answered in the affirmative.

Solicitors, for the appellant, *Cape, Kent & Gaden.*

Solicitor, for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

(1) 7 App. Cas., 127.

(2) 12 N.S.W.L.R. (Eq.), 319.

[HIGH COURT OF AUSTRALIA.]

HEYDON . . . . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX, NEW SOUTH WALES } RESPONDENT.

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SYDNEY, *April* 15.

Griffith C.J., Barton, Isaacs and Powers JJ.

Land tax—Assessment—Leases granted before commencement of Act—Assessment of lessee—Sub-lease—Unimproved value—Basis of calculation—Regulations, validity of—Land Tax Assessment Act 1910-1911 (*No.* 22 *of* 1910—*No.* 12 *of* 1911), *sec.* 28—*Land Tax Regulations* 1911 (*Statutory Rules* 1911, *Nos.* 8, 23, 83, 176), *reg.* 51.

Regulation 51 of the *Land Tax Regulations* 1911, which provides (*inter alia*) that for the purposes of sec. 28 of the *Land Tax Assessment Act* 1910-1911 the unimproved value of a leasehold estate in land under a lease made before 17th November 1910 shall be calculated on a 4½ per cent. basis, is valid.

Method of ascertaining the unimproved value of the estate of a lessee of land leased before the commencement of the *Land Tax Assessment Act* and of which sub-leases were granted by the lessee before that date, discussed.

SPECIAL CASE for the opinion of the Court.

On the hearing of an appeal by Louis Francis Heydon against assessments for land tax as of 30th June 1910 and 30th June 1911, *Rich* J. stated a case for the opinion of the Full Court, the material portions of which were as follow :—

"1. The appellant, Louis Francis Heydon, was on 30th June 1910 and on 30th June 1911, respectively, the lessee from one John Cooper of 54 acres 3 roods 30 perches of land situated at Neutral Bay, in the State of New South Wales. The said area of land is subdivided into numerous allotments. Almost all of the said allotments are severally leased by the appellant to

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various sub-tenants. The remaining few allotments are not leased by the appellant.

"6. The land in respect of which the assessments of land tax appealed from were made is admitted to be land coming within the provisions of sec. 28 of the *Land Tax Assessment Act* 1910-1911.

"7. The part of the unimproved value of the land corresponding to the unexpired term of the lease as mentioned in sec. 28 (3) (*a*) of the said Act has been in fact calculated under Table 1 in the Schedule to the Regulations under the said Act upon the assumption that the annual unimproved value of the land is 4½ per cent. of the capital unimproved value.

"8. Table 1 in the said Schedule is the table which purports to have been prescribed by the regulations under the *Land Tax Assessment Act* 1910-1911 for the calculation of values under the provisions of secs. 28 (3) (*a*) and 74 of the said Act.

"9. The average rate of interest on investments earned by life assurance and other similar companies in Australia is admitted to be £4 8s. 8d. per cent. per annum.

"10. The respondent has assessed the land tax payable by the appellant for the year 1910-1911 at £81 17s. 1d.

"11. The respondent has assessed the land tax payable by the appellant for the year 1911-1912 at £167 3s. 9d.

"The appellant contends:—

"(*a*) That rule 51 of the Land Tax Regulations 1911 is *ultra vires* and therefore void for the reason that it is not competent, under the *Land Tax Assessment Act* 1910-1911, to prescribe by regulation that for the purpose of sec. 28 of the Act the unimproved value of a leasehold estate in land under a lease made before 17th November 1910 shall be calculated in every case on the uniform basis of 4½ per cent. under Table 1.

"(*b*) That rule 51, if *intra vires*, should be applied in the manner hereinafter set out. The unimproved value of the appellant's estate in each allotment of land should be calculated in the way prescribed in the said rule. The unimproved value of his sub-tenant's estate in each of such allotments should be similarly calculated. The admitted unimproved value of each allotment should then be assessed between the parties in the ratio that the

value of the appellant's estate, the sub-tenants' estates and the said John Cooper's estate, bear to one another.

"(*c*) That, accepting the unimproved value of the subject land at £27,580 in 1910-1911 and at £41,199 in 1911-1912, the unimproved value of the respective estates therein of the said John Cooper, of the appellant, and of his sub-tenants, has not been properly calculated.

"(*d*) That the unimproved value of the appellant's estate in each of the said allotments is the unimproved value thereof at the time of leasing.

"The questions for the opinion of the Court are:—

"(1) Whether rule 51 of the Land Tax Regulations 1911 is *ultra vires* and void.

"(2) Whether the respective assessments appealed from ought to be reduced and if so to what extent.

"(3) In what manner the respective assessments should be calculated."

Campbell K.C. (with him *Norris*), for the appellant.

Blacket K.C. and *Crawford*, for the respondent, were not called upon.

GRIFFITH C.J. The questions in this case arise under sec. 28 of the *Land Tax Assessment Act* 1910-1911, which makes provision for the assessment of land tax in the case of leases granted before the commencement of the Act. All the leases now in question were so granted. The appellant is the lessee of land for a long term, of which between 60 and 70 years have still to run, and he has granted a number of sub-leases of various portions of the land, all of which at the time the sub-leases were granted were in an unimproved condition. Sec. 28 lays down rules for the assessment of land tax upon leaseholds. The rules are arbitrary. I do not for a moment suggest that they are unjust. On the contrary, they seem to me to be eminently reasonable; but all we have to do is to see what they mean and to follow them.

The first rule is that where the owner of a freehold estate in land has before the commencement of the Act granted a lease of

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it, he is entitled during the currency of the lease to have what is called the "unimproved value" of the lease deducted from the unimproved value of the land. The principle is that the burden of the land tax, which is assessed upon the unimproved value of land, shall in such cases be divided between the owner and the lessee. Sub-sec. 2 prescribes how that division is to be made. The owner of a leasehold estate in land "shall be deemed to be, in respect of the land, the owner of land of an unimproved value equal to the unimproved value (if any) of his estate." This provision is not felicitous, and may, I think, be paraphrased thus: "shall be deemed to be the owner of an interest corresponding to the unexpired term of his lease in land of an unimproved value equal to that of the land in question." That is entirely irrespective of the amount of the rent which he pays, which may be a peppercorn or a rack rent. The value of his interest in the land, *quâ* land, is the same in either case. Then the sub-section goes on to say that if before the commencement of the Act the lessee has entered into an agreement to make, or has granted, a lease of the land, "he shall be entitled, during the currency of that lease, to have the unimproved value (if any) of that lease deducted from the unimproved value of his estate." Then, for the purpose of ascertaining the unimproved value of a lease, this rule is laid down by sub-sec. 3:—"The unimproved value of a lease or leasehold estate of land means the amount by which the part of the unimproved value of the land corresponding to the unexpired term of the lease exceeds the value of the rent reserved by the lease, according to calculations based on the prescribed tables for the calculation of values." The first step, therefore, in every case, is a matter of calculation, and is to apportion the total value between the value of the term and the value of the reversion. The respective values may fluctuate from a variety of circumstances, but the legislature has thought fit to say that they shall be ascertained by reference to prescribed tables. Regulations have been made prescribing that the calculation shall be made on what is called a $4\frac{1}{2}$ per cent. basis. For the purpose, then, of ascertaining the value of the term the method is to ascertain first the whole unimproved value of the land. The annual value is assumed to be $4\frac{1}{2}$ per cent. of that value, and the value

of the term is ascertained by capitalizing that annual value for a period equal to the term of the lease. That gives the value of the term on which *primâ facie* land tax is to be paid by the lessee, the lessor being responsible for the tax on the remainder. That is on the supposition that the lessee pays no rent. Then comes the question of what is the value of the lease—if the lessee pays rent. In that case he is entitled to deduct from the value so ascertained the value of the rent reserved by the lease. The next calculation then is to ascertain the value of that rent. That is defined to be the rent for the term of the lease capitalized at 4½ per cent. Deducting that from the value of the unexpired term ascertained as if no rent were payable you get the amount in respect of which the lessee is to pay land tax if there is no sub-lease. If there is a sub-lease, exactly the same process is to be adopted. If the sub-lessee does not pay any rent the whole value of his unexpired term may be deducted by the head lessee from the value of his term, just as the value of his term in a similar case may be deducted by the owner. If he does, he may only deduct a part of it. The process is exactly the same in each case. The head lessee is entitled to two deductions, which should, strictly speaking, be made separately.

It is suggested that the regulation fixing the 4½ per cent. basis for the calculation of values is *ultra vires*. I confess that I am unable to follow the argument. Some rule must of necessity be laid down unless each case is to be decided upon evidence. Parliament has authorized the Executive to prescribe a rule. They have done so, and I can see no argument to support the contention that the regulation is *ultra vires*.

The first question asked is whether rule 51 of the Land Tax Regulations 1911 is *ultra vires* and void. That should be answered in the negative.

The second question is whether the respective assessments appealed from ought to be reduced and if so to what extent. Mr. *Blacket* says that the assessments have been made exactly on the principle I have stated, and so far as I can see from the documents referred to in the case it appears to be so, although a short cut seems to have been followed, which may have led to error.