[HIGH COURT OF AUSTRALIA.]

THE SOUTH AUSTRALIAN LAND MORTGAGE AND AGENCY COMPANY LIMITED } APPELLANT;

AND

TAYLOR AND ANOTHER . . . . APPELLANTS;

AND

THE LAW DEBENTURE CORPORATION LIMITED . . . . . } APPELLANT;

AND

MANIFOLD AND OTHERS . . . . APPELLANTS;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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SYDNEY, *April* 3-7; *May* 4.

Knox C.J., Isaacs, Higgins, Gavan Duffy and Starke JJ.

Crown Lands (Queensland)—Lease—Pastoral holding—Determination of rent—Determination afresh of rent already determined—Jurisdiction of Land Court and Land Appeal Court—Retrospective legislation—"Assessment of rent"—Determination that rent not less than a sufficient rent—Evidence—Land Acts 1910-1918 *(Qd.)* (1 *Geo. V. No.* 15—9 *Geo. V. No.* 8), *secs.* 29, 31, 32, 35, 42, 43*—*Land Act Amendment Act* 1920 *(Qd.)* (10 *Geo. V. No.* 30), *sec.* 2*.

* Sec. 29 of the *Land Act of* 1910-1918 (Qd.) provides that "Whenever it is necessary to determine the amount of any rent, . . . such amount shall be determined by the Court" (which means in the Act the Land Court) "and the following rules shall be observed:—(i.) If the Crown is a party, the Minister shall furnish to the Court a report and a valuation with respect to the land . . . for which the rent . . . is to be paid, made by the Commissioner or some other person; (ii.) The Court shall require the lessee . . . by . . . whom . . . the rent . . . is or will be payable, to furnish to it a like valuation . . . and such valuation . . . shall be furnished accordingly." Sec. 31 provides that "The powers and duties conferred

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Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Gavan Duffy* and *Starke* JJ. :—

(1) That with respect to a pastoral lease the annual rent whereof for the second period had been determined by the Land Court prior to the passing of the *Land Act Amendment Act of* 1920 (Qd.), the Land Court was required by proviso (*b*) to sec. 2 (3) of that Act, if it considered that the rent so determined was less than a sufficient rent, to determine afresh the annual rent for the whole of the second period of the lease.

(2) That the Land Court in determining the amount of rent was not limited by the valuations furnished by the Crown and the lessee respectively pursuant to sec. 29 of the *Land Acts of* 1910-1918 (Qd.).

Australian Pastoral Co. v. *The King*, (1920) S.R. (Qd.), 73, approved.

(3) That the determination afresh of annual rent by the Land Court under proviso (*b*) to sec. 2 (3) of the *Land Act Amendment Act of* 1920 is an "assessment of rent" within the meaning of sec. 31 of the *Land Acts of* 1910-1918, and therefore is subject to appeal to the Land Appeal Court.

(4) That evidence given by an assessing Commissioner appointed under the *Land Acts of* 1910-1918 of the rental value of the land based on an inspection made by him after the passing of the *Land Act Amendment Act of* 1920 was admissible under sec. 35 (8) and (9) of the Act of 1910 on an appeal to the Land Appeal Court from a decision of the Land Court determining afresh under

and imposed upon the Court shall be exercised and performed by one member only thereof in respect of the following matters, namely:— . . . (*c*) Assessment of rent . . . where the amount is under this or any other Act to be determined by the Court; . . . But, subject to this Act, the Crown or any party aggrieved may appeal from the decision of such member in the manner hereinafter provided. In all other cases the Court may be constituted of one member or of two or more members sitting together." Sec. 35 constitutes the Land Appeal Court for the purpose of hearing appeals from the Land Court; and provides (*inter alia*):—"(8) The appeal shall be in the nature of a rehearing," &c. "(9) Evidence on an appeal to the Land Appeal Court may be taken in the same manner as is hereinbefore prescribed with respect to matters heard and determined by the Land Court," &c. Sec. 42 provides that "When the term of the lease of any pastoral holding exceeds ten years, the term shall be divided into periods. The last period shall be of such duration as will permit the other period, or each of the other periods, as the case may be, to be of the duration of ten years." Sec. 43 provides that "In addition to the other conditions prescribed in this Act, every pastoral lease shall be subject to the following conditions, namely:—(i.) The lessee shall, during the term, pay an annual rent at the rate for the time being prescribed; the rent shall be computed according to the number of square miles of land comprised in the lease; (ii.) The rent payable for the second and each succeeding period, if any, shall be determined by the Court" (*i.e.*, the Land Court);" &c. "Provided that, with respect to all pastoral holdings mentioned in the Second Schedule, except when otherwise expressly stated in the said Schedule, the annual rent for each period after the first shall not exceed the annual rent payable for the next preceding period by more than one-half of the annual rent payable for such preceding period. But nothing in this section shall be deemed to limit the maximum of rent which may be determined in the event of public works being executed or extensive mineral developments occurring, as hereinafter provided." Sec. 2 of the *Land Act Amendment Act of* 1920 (Qd.) (assented to on 9th March 1920) provides that

proviso (*b*) to sec. 2 (3) of the Act of 1920 the annual rent of a pastoral holding the annual rent of which had already been determined before the passing of the latter Act.

(5) That the duty of the Land Court to determine rent is a statutory duty in the performance of which the Court is not restricted either by facts proved before it which are alleged to constitute an agreement between the Crown and the lessee or by conduct of either or both of the parties in the Court, and that the Land Appeal Court has the same powers and duties as the Land Court for the purposes of an appeal.

Held also, by *Isaacs*, *Higgins* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that a decision by the Land Court under proviso (*b*) to sec. 2 (3) of the *Land Act Amendment Act of* 1920, that the annual rent of a pastoral holding which had already been determined was not less than a sufficient rent, is a decision with respect to "assessment of rent" within the meaning of sec. 31 of the *Land Acts of* 1910-1918, and therefore is subject to appeal to the Land Appeal Court.

Decision of the Supreme Court of Queensland: *South Australian Land Mortgage and Agency Co.* v. *The King*, (1921) S.R. (Qd.), 199, in substance affirmed.

APPEALS from the Supreme Court of Queensland.

On the hearing of an appeal by the Crown to the Land Appeal Court of Queensland from a determination by the Land Court of

"(1) In section forty-three of the Principal Act, the following words are repealed:—" (Then followed the words commencing with "Provided that" and ending with "as hereinafter provided," above set out, and the section continued:—) "(2) In the fifth column of the Second Schedule of the Principal Act, the words 'The limitation as to increase of rent so as not to exceed by more than one-half the rent for the next preceding period does not apply,' wherever the same occur, are repealed. (3) The amendments of the said section forty-three and Schedule II. hereby made shall have effect with respect to every pastoral holding, whether the annual rent thereof has or has not been actually determined by the Court under the said section forty-three at the passing of this Act, and to this extent this enactment shall have retrospective operation: Provided that with respect to pastoral holdings the annual rent whereof has been actually so determined at the passing of this Act, whether any appeal is pending from any such determination or not—(*a*) The Governor in Council may, by notification in the *Gazette*, direct and declare that the annual rent of certain holdings mentioned in such notification is a sufficient rent for the period for which it has been so determined, in which case the Court shall not determine afresh such rent; (*b*) In all cases except those referred to in paragraph (*a*) hereof, it shall be the duty of the Court to consider whether the annual rent of each holding for the period for which it has been determined is less than a sufficient rent, and if the Court considers that such rent is less than a sufficient rent the Court shall determine afresh such annual rent; and the annual rent so determined afresh shall be the annual rent for the period for which the rent is to be determined. The pastoral tenant shall forthwith pay the arrears of rent due by reason of any increase in rent under such fresh determination so as to adjust the balance due to the Crown: Provided that in any case where the Minister is satisfied that the immediate payment of the whole of such arrears would be a hardship he may accept payment thereof in such instalments as the Minister thinks just."

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the rent of the Hamilton Downs pastoral holding of which the South Australian Land Mortgage and Agency Co. Ltd. was lessee, the Land Appeal Court stated a special case, which was substantially as follows, for the opinion of the Supreme Court :—

1. The appellant, the South Australian Land Mortgage and Agency Co., is the lessee from the Crown of Hamilton Downs pastoral holding, situated in the Burke District in the State of Queensland and having an area of 277 square miles.

2. The existing lease of Hamilton Downs pastoral holding began on 1st January 1905 and expires on 30th June 1933.

3. The rent for the first period of ten years of such lease was 40s. per square mile, which is the rent stated against the holding in the third column of the Second Schedule to the *Land Act of* 1910 (Qd.).

4. The second period of ten years of the lease of the said holding commenced on 1st January 1915, and under the provisions of the *Land Act of* 1910, secs. 29, 43 (ii.) and 44 (ii.), it became necessary that the rent to be charged for the holding during that period should be determined by the Land Court.

5. During the month of March 1915 the said holding was inspected by Assessing Commissioner Arthur Warde, who thereafter made a report and a valuation which later were furnished to the Land Court by or on behalf of the Minister for Lands in compliance with the requirements of sec. 29 (i.) of the *Land Act of* 1910.

6. Assessing Commissioner Warde in his said valuation showed that in his opinion the fair rental value of Hamilton Downs holding during the second period of the lease was £872 11s. per annum, being at the rate of 63s. per square mile.

7. On 7th November 1917, before the Hon. Dr. Kidston sitting as a Land Court at Hughenden, the rent to be charged for the said holding for the second period of the lease was with the consent of the lessee determined at 60s. per square mile per annum, which was the highest rate of rent then determinable under sec. 43 of the *Land Act of* 1910.

8. The *Land Act Amendment Act of* 1920 (Qd.) was assented to on 9th March 1920 ; and a *Queensland Government Gazette* was published on 11th March 1920 in which His Excellency the Lieutenant Governor, with the advice of the Executive Council and in pursuance and

exercise of the authority vested in him by the *Land Act of* 1910 as amended by the *Land Act Amendment Act of* 1920, notified, directed and declared that the annual rent of the pastoral holdings mentioned in the Schedule thereto was a sufficient rent for the second period, being the period for which it had been so determined. The pastoral holding of Hamilton Downs was not mentioned in the said Schedule.

9. By a notice in writing dated 19th March 1920 the Registrar of the Land Court sent to the appellant a notification that the matter of the rent to be charged for Hamilton Downs holding would be brought before the Land Court at Hughenden on 27th April 1920, adding: "The Court will, as required by sub-sec. 3 (*b*) of sec. 2 of the *Land Act Amendment Act of* 1920, consider whether the rent of 60s. per square mile per annum already determined is less than a sufficient rent; and if the Court considers that the rent is less than a sufficient rent it will determine the rent afresh."

10. The solicitors for the appellant wrote a letter to the Under-Secretary for Lands which, so far as is material, was as follows:— "We have been instructed that the rent for the second period of ten years, which commenced on 1st January 1915, was fixed and determined by consent, at the Land Court held at Hughenden on 7th November 1917, at 60s. By letter to the Company dated 9th October 1917 you advised that, the Company having decided to agree to the rental of 60s. per square mile, there would be no need to communicate further with the Land Court, or to be represented at the hearing, and that the letter by the Company agreeing to the increased rental was all that the Department required, which letter would be forwarded on to the Land Court at Hughenden. We are now instructed that it is proposed to increase the rental of the holding by 3s. per square mile, making 63s. per mile in all, and to notify you that the lessee Company is prepared to agree to and to pay this increased rental, and to arrange with you that this intimation would be all that was required and that it would be unnecessary for the Company to be represented at the Land Court at Hughenden on 27th instant. Will you please let us have a letter on similar lines to yours of 9th October 1917, above referred to, to the effect that the new rental would not be fixed at more than 63s., and that

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there would be no necessity to communicate with the Land Court, or to be represented at the hearing, and that this letter would be forwarded on to the Court, together with a copy of your reply to same."

11. The Under-Secretary for Lands replied, stating that the Land Court had been advised that the appellant was agreeable to the Commissioner's valuation of 63s. per square mile being fixed as the rent of Hamilton Downs holding for the second period of the lease.

12. The Under-Secretary for Lands wrote to the Registrar of the Land Court a letter stating that the solicitors for the appellant had accepted, on behalf of the appellant, the Commissioner's valuation of 63s. per square mile being determined as the rent of the holding during the second period of the lease.

13. The matter of the consideration and contingent redetermination of the said rent came on for hearing before the Hon. H. F. Hardacre, sitting as a Land Court at Hughenden, on 27th April 1920. The Court considered that the rent already determined for the second period of the lease was less than a sufficient rent, and determined such annual rent afresh at the rate of 63s. per square mile per annum.

15. No report or valuation, other than the report and valuation of Assessing Commissioner Warde referred to in pars. 5 and 6 hereof, was furnished to the Court for the purpose of the said proceedings before the Hon. H. F. Hardacre.

16. On 5th June 1920 the Crown gave notice of appeal against the decision of the Land Court constituted by the said Hon. H. F. Hardacre, on one ground, namely, that the rent as determined at the above rate is too low.

17. On 3rd September 1920 the Minister for Lands wrote the solicitors for the appellant substantially as follows:—"With reference to your 'phone conversation with me this morning regarding the redetermination of the rent on Hamilton Downs holding in the Burke District for the second period of the lease under the provisions of the *Land Act Amendment Act of* 1920, I have to inform you that the Assessing Commissioner's valuation of 63s. per square mile, which was accepted by the lessees and adopted by the Land Court,

was made on 3rd August 1917, when the law in regard to the valuation of pastoral holdings was not as clearly defined as at the present time. On account of the more definite bases of assessment since laid down by the Court in rental matters, this Department considers the Assessing Commissioner's valuations to be too low on Hamilton Downs and other pastoral holdings in the vicinity. I have therefore given notices of appeal from the decisions of the Land Court, and the matters have been set down for hearing at a sittings of the Land Appeal Court to be held at Hughenden on 18th October next. As an appeal to the Land Appeal Court is in the nature of a rehearing, both the Crown and the lessees will have the same opportunity of presenting any evidence deemed necessary to support their respective views as to the fair rental value of the holdings concerned."

18. The said solicitors replied thereto on 3rd September 1920, saying:—"The arrangement with regard to the rental at the rate of 63s. per square mile was not made, as you suggest, on 3rd August 1917, but was made since the new Act and was confirmed by the Court which sat at Hughenden on 14th May last; and in this connection we would refer you to the notification which we received from the Registrar of the Land Court on or about 22nd May last. We trust that you will further investigate this matter, as it is apparent there is some departmental misconception regarding the facts of this particular case. We feel sure that the Department does not wish to have its own agreement, made since the new Act, reopened, and that the appeal is taken in error."

19. On 8th September 1920 the Minister for Lands wrote again to the solicitors for the appellant, substantially as follows:—"I have your letter of the 3rd instant, having further reference to the matter of the appeal by the Crown from the Land Court's decision determining the rent of Hamilton Downs holding, Burke District, and in reply to state that the valuation of 63s. per square mile was made by the Assessing Commissioner on 3rd August 1917 as advised in my former letter. This valuation was accepted by the lessees, and adopted by the Land Court at Hughenden on 14th May last; but, as already advised, such valuation is, for the reasons previously given, considered by the Department to be too low. With a view to obtaining uniform rentals in the locality, notices of appeal were

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given in this and other cases, and the determination of the fair rental value of all such holdings must now be left to the Land Appeal Court."

20. The matter of the hearing of the said appeal came before the Land Appeal Court, constituted by his Honor Mr. District Court Judge O'Sullivan, Mr. F. X. Heeney and Mr. P. W. Shannon, which sat at Hughenden on 22nd October 1920. On the hearing of the said appeal the Crown was represented by Messrs R. J. Douglas and Payne of counsel, and the lessee by Mr. Woodbine.

21. Mr. Woodbine for the lessee raised the preliminary objection that an appeal by the Crown was incompetent under the circumstances of the case, because (1) it is excluded by the provisions of sec. 2 (3) (*b*) of the Amendment Act of 1920 and sec. 28 of the *Land Act of* 1910; (2) the Crown is not a party aggrieved within the meaning of sec. 31 inasmuch as (*a*) the rent asked for was the rent assessed by the Land Court Judge, (*b*) the only issue raised by the Crown was decided in favour of the Crown by consent, (*c*) on the evidence and decision there could be no rehearing within the meaning of sec. 35 (8); (3) the Crown is estopped, by reason of its conduct at the hearing before the Land Court Judge from questioning the decision; (4) the Crown cannot by the subterfuge of an appeal make a new case on a new issue not raised at the hearing; (5) there is no jurisdiction in the Land Court or the Land Appeal Court to redetermine rent under the Amendment Act of 1920 as rent under review was not determined by the Court but agreed on between the parties in accordance with the provisions of sec. 43 of the Act of 1910; (6) the rent, if any redeterminable under the Amendment Act of 1920, was made the subject matter of an agreement between the Crown and the lessee recorded in the decision of the Court below; (7) the judgment (if any) was a judgment by consent from which no appeal lies; (8) there is no jurisdiction in the Land Court Judge or the Land Appeal Court to redetermine rent, because (*a*) Land Court referred to in sec. 2 (3) (*b*) of the Amendment Act of 1920 is Court as defined in sec. 4 of the Act of 1910 and comprising members referred to in sec. 20, (*b*) foundation for proceedings required by sec. 29 is absent, (*c*) no compliance with requisites of sec. 2 (3) (*b*)

of Amendment Act of 1920 *re* preliminary consideration whether rent 63s. is less than a sufficient rent.

22. The Land Appeal Court reserved its decision on the preliminary objection, and decided to proceed with the hearing of the appeal subject to its decision on the point raised.

23. The report and valuation made by Assessing Commissioner Arthur Warde and referred to in pars. 5 and 6 hereof were produced by the Registrar of the Land Appeal Court. These were objected to by the lessee's representative on the ground that they were not furnished for the purpose of this redetermination and were not as of the date of this redetermination. The report and valuation were admitted by the Court as furnished by the Minister under the provisions of sec. 29 of the *Land Act of* 1910.

24. It was contended on behalf of the lessee that the gazetted notification of the Governor in Council referred to in par. 8 set a standard of comparison as to the value of land of similar quality in the same neighbourhood, which the Court was bound to accept. The Court held that, while the notification was a factor which should be taken into consideration in the determination of rent, it did not establish any absolute standard which the Court was bound to accept or exclude factors which would otherwise be taken into consideration.

25. A further objection was taken on behalf of the lessee that, the Crown having furnished the Court with the valuation of Assessing Commissioner Warde as a compliance with the provisions of sec. 29 of the *Land Act of* 1910, the Court was bound to treat that valuation as the maximum claim made on behalf of the Crown, and was precluded from exceeding the amount fixed in that valuation in its decision as to the fair and reasonable rent to be paid for the holding during the second period of the lease thereof. The Court overruled this objection.

27. On 20th November 1920 at Brisbane the Court gave its judgment overruling the preliminary objection; and held (1) that the decision of the Land Court under sec. 2 (3) (*b*) of the Amendment Act of 1920 determining the rent of Hamilton Downs pastoral holding afresh was appealable, (2) that the duty cast on the Court by sec. 2 (3) (*b*) of the Act of 1920 is first to consider whether the annual

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rent "for the period for which it has been determined" is less than a sufficient rent and in the next place under certain circumstances to determine afresh the annual rent for the same period, (3) that if any question should arise as to the extent of the lessee's liability under the Court's determination afresh that was not a matter which came up for decision in the proceedings then before the Land Appeal Court, (4) that the Crown's right of appeal does not depend on whether it is "aggrieved" or not within the meaning of sec. 31, (5) that the Crown was not estopped by its conduct at the hearing before the Land Court from questioning the Land Court's decision, (6) that the duty of the Land Court to determine rent is a statutory duty which cannot be restricted or affected by contract between the Crown and lessee or by conduct of either or both, and that for the purposes of an appeal the Land Appeal Court has the same powers as the Land Court, (7) that the requirements of sec. 29 (1) had been complied with but that in any event it was a procedure section and did not affect jurisdiction. The Court allowed the appeal, and by its judgment determined the rent of the said holding afresh at the rate of 80s. per square mile per annum.

The questions of law arising for the determination of the Supreme Court are :—

(1) Was the Land Appeal Court right in holding that the decision of the Land Court under sec. 2 (3) (*b*) of the Amendment Act of 1920 determining the rent of Hamilton Downs pastoral holding afresh was appealable ?

(2) Was the Land Appeal Court right in holding that the period in respect of which it was required to determine the rent of the said pastoral holding afresh was the period for which the rent had already been determined in the Land Court on 7th November 1917, viz., the whole of the second period of the lease ?

(3) Was the Land Appeal Court right in holding that the duty of the Land Court to determine rent is a statutory duty which cannot be restricted or affected by contract between the Crown and lessee or by conduct of either or both, and that for the purposes of an appeal the Land Appeal Court has the same powers as the Land Court ?

(4) Was the Land Appeal Court right in holding that the requirements of sec. 29 (1) had been complied with, but that in any event it was a procedure section and did not affect jurisdiction?

(5) Was the Land Appeal Court right in admitting the valuation of Assessing Commissioner Warde as a valuation furnished by the Minister under the provisions of sec. 29 of the *Land Act of* 1910?

(6) Was the Land Appeal Court right in holding that it was not bound to treat the amount of the valuation furnished to the Court on behalf of the Minister under the provisions of sec. 29 of the *Land Act of* 1910 as the maximum amount at which it could determine the rent of Hamilton Downs pastoral holding afresh?

(7) Was the Land Appeal Court right in law in holding that, while the notification by the Governor in Council in the *Queensland Government Gazette* of 11th March 1920 declaring the sufficiency of the rents determined for the pastoral holdings therein mentioned is a factor which should be taken into consideration in the determination of rent, it does not establish any absolute standard which the Court is bound to accept or exclude factors which would otherwise be taken into consideration?

(8) Is there any evidence to support the decision of the Land Appeal Court determining the rent of Hamilton Downs pastoral holding afresh?

(9) Was the Land Appeal Court right in law in allowing the appeal of the Crown?

(10) How and by whom should the costs of this special case be paid?

The record of the proceedings before the Land Appeal Court was incorporated in the special case; from which it appeared that James Ernest Arnold, an assessing Commissioner, produced a report made by him of an inspection of Hamilton Downs made by him in August 1920, and gave evidence that a fair rent value of the holding was 85s. per square mile.

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Similar cases were stated by the Land Appeal Court in respect of similar proceedings by the Crown as to the Katandra pastoral holding, of which Hugh C. Taylor and Richard B. E. Craig were lessees; the Dagworth pastoral holding, of which the Law Debenture Corporation Ltd. was the lessee; and the Sesbania pastoral holding, of which James Chester Manifold, William Thomson Manifold, Edward Manifold (for themselves personally and as executors of the late Thomas Peter Manifold), and John Edward Bostock were the lessees.

The questions 2, 4, 5, 6, 7, 8 and 9 in the case above set out were asked in each of the four cases; question 1 was asked also in the cases as to Katandra and Sesbania, and question 3 was asked also in the case as to Katandra.

In the Katandra case it was stated that the rent for the second period of ten years was determined on 7th November 1917 by the Land Court at 56s. 9d. per square mile, and that, when a notice similar to that mentioned in par. 9 of the Hamilton Downs case was sent to the lessees on 19th March 1920, they wrote to the Registrar of the Land Court saying that they considered that the rent of 56s. 9d. per square mile was excessive but that they were prepared to accept the Assessing Commissioner's valuation of 60s. per square mile for the unexpired term of the second period. When the matter came before the Land Court, counsel for the Crown asked that the rent be determined at 60s. per square mile, referring the Court to the letter of the lessees. The Court thereupon stated that it considered the rent previously determined to be insufficient, and determined afresh the rent at 60s. per square mile. On an appeal by the Crown the Land Appeal Court determined the rent afresh at 70s. per square mile. In the Sesbania case the rent for the second period was, on 23rd December 1917, determined at 58s. 6d. per square mile. On 17th April 1920 the Land Court determined it afresh at 66s. 8d. per square mile, and on appeal by the Crown the Land Appeal Court determined the rent afresh at 90s. per square mile.

Two further questions were asked in the case as to Dagworth, namely:—(1) Was the Land Appeal Court right in holding that the decision of the Land Court on 17th April 1920 was in effect

a decision that the rent which had been determined, viz., 52s. 10½d., was not less than a sufficient rent? (2) Was the Land Appeal Court right in holding that such decision was in respect of the matter of an assessment of rent within the meaning of sec. 31 of the *Land Act of* 1910 and was appealable? These two questions, as stated in the particular case, arose out of the following circumstances:—The lease of Dagworth began on 1st January 1905 and ended on 31st December 1944. The rent for the first period of ten years was at the rate of 35s. 3d. per square mile. At the Land Court on 23rd November 1917 evidence was given that a fair rental value was 53s. 4d. per square mile, and that Court with the consent of the lessee determined the rent for the second period of ten years at 52s. 10½d. per square mile, which was the highest rate of rent which could then be determined. On 10th March 1920 notice was given by the Registrar of the Land Court to the lessee that the matter of the rent for the Dagworth holding would be brought before the Land Court on 12th April 1920, and that the Court would be required to consider whether the rent of 52s. 10½d. per square mile was less than sufficient, and that if it considered that the rent was less than sufficient it would determine the rent afresh. On the matter coming on for hearing before the Land Court on 15th April 1920 that Court, in its decision, stated that it considered that the annual rent determined for the second period of the lease of Dagworth, namely 52s. 10½d., was a sufficient rent, and that it accordingly determined afresh such annual rent at the rate of 52s. 10½d. per square mile. The Crown appealed from that decision to the Land Appeal Court, which determined that the matter was appealable, and allowed the appeal and determined the rent afresh at the rate of 56s. per square mile.

The special cases were heard before the Full Court, which, by a majority (*Real*, *Shand* and *McCawley* JJ., *Cooper* C.J. and *Lukin* J. dissenting), delivered a judgment dealing with all of them. The Court answered the questions set out in the case relating to Hamilton Downs as follows:—It answered questions 1, 2, 5, 6, 8 and 9 in the affirmative. It answered question 3 as follows: "The Land Appeal Court would have been right if it had held that the duty of the Land Court to determine rent is a statutory duty which cannot be restricted

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or affected by contract between the Crown and lessee, or by conduct of either or both, and that for the purposes of an appeal the Land Appeal Court has the same powers as the Land Court in cases properly brought before the Land Appeal Court on appeal from the Land Court." It answered question 4 (*a*) in the affirmative, and said that it was unnecessary to answer question 4 (*b*). It answered question 7 as follows: "The notification referred to in the question numbered 7 in the said special case does not establish any standard which the Land Appeal Court is bound to accept, or exclude factors which would otherwise be taken into consideration." The Court answered the two questions in the case relating to Dagworth above set out in the affirmative: *South Australian Land Mortgage and Agency Co.* v. *The King* (1).

From that decision the lessees of each of the holdings now appealed to the High Court, and the four appeals were heard together. At the hearing of the appeal the answers to questions 4, 5 and 7 were not argued.

Macrossan (with him *Weston*), for the appellants. An appeal does not lie to the Land Appeal Court from a determination afresh by the Land Court of rent under proviso (*b*) to sec. 2 (3) of the *Land Act Amendment Act of* 1920. The Land Court acting under that proviso is not acting under sec. 43 or sec. 31 of the *Land Act of* 1910, but is acting under a new jurisdiction which is given in such terms as exclude an appeal. The Land Court under the proviso sits as a Court of review in respect to the Land Court, which had already determined the rent under the Act of 1910, and is really a Court of appeal. A determination afresh of rent under proviso (*b*) is not an "assessment of rent" within sec. 31 of the Act of 1910, and is not appealable under that section; and, even if it is, a decision under the proviso that the rent already determined is not less than a sufficient rent is not an "assessment of rent" within that section. In the latter case the Court has no jurisdiction to make an assessment of rent unless it considers that the rent already determined is less than sufficient. The determination in the cases of Hamilton Downs and Katandra was a judgment by consent, and the Crown was not entitled

(1) (1921) S.R. (Qd.), 199.

to appeal (see *Judicature Act* 1876, sec. 9). Under sec. 29 of the Act of 1910 the proceedings before the Land Court are *inter partes* and the Crown has to make a claim. If the lessee agreed to the rent being determined at a certain amount he could not appeal because he would not be an aggrieved party. The Crown is, under sec. 31, in the same position as any other party where it consents to a determination of a certain amount of rent. The Crown had made an agreement of which a necessary term was that neither side should appeal, and that creates an estoppel. The Crown has, by that agreement, induced the lessees to alter their position and act to their detriment. The agreement was one which it was competent for the Crown to make and was not contrary to any provisions of the Acts. The Minister for Lands had a discretion to say whether there should be an appeal. He might waive the right to appeal, and, having done so, he would be estopped in the Land Appeal Court from saying that the Crown was entitled to a higher rent than that determined by the Land Court. [Counsel referred to *O'Keefe* v. *Williams* (1); *O'Keefe* v. *Williams* (2); *R.* v. *Winten* (3); *Davenport* v. *The Queen* (4); *Harrup* v. *Bayley* (5); *R.* v. *Tomkins* (6).]

[ISAACS J. referred to *Attorney-General* v. *Sillem* (7); *White* v. *Duke of Buccleuch* (8); *Pisani* v. *Attorney-General for Gibraltar* (9).

[HIGGINS J. referred to *Jorden* v. *Money* (10); *In re Hull and County Bank*; *Trotter's Claim* (11).]

The valuation furnished on behalf of the Crown before the Land Court is the maximum amount of rent which can be determined by the Court. The decision in *Australian Pastoral Co.* v. *The King* (12) to the contrary is wrong. The Land Court is not at large as to the amount of rent, but has to determine the issue which is raised by the valuations supplied by the Crown and the lessee respectively; and the Land Appeal Court has to determine the same issues. The reports furnished under sec. 29 are in the nature of pleadings, and fix a maximum and minimum within which the Court must determine

(1) (1907) 5 C.L.R., 217, at p. 226.
(2) (1910) 11 C.L.R., 171, at pp. 190, 197, 209.
(3) (1907) S.R. (Qd.), 44.
(4) (1877) 3 App. Cas., 115, at p. 131.
(5) (1856) 6 El. & Bl., 218.
(6) (1919) S.R. (Qd.), 173.
(7) (1864) 10 H.L.C., 704, at p. 724.
(8) (1866) L.R. 1 H.L. (Sc.), 70.
(9) (1874) L.R. 5 P.C., 516.
(10) (1854) 5 H.L.C., 185.
(11) (1879) 13 Ch. D., 261.
(12) (1920) S.R. (Qd.), 73.

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(*Re Murweh* (1)). The proviso (*b*) to sec. 2 (3) of the Act of 1920 does not entitle the Land Court to determine rent in respect to any portion of the particular period of the lease which had expired at the time that Act was passed. Sec. 2 (3) applies to all pastoral leases whether they were subject to the limitation of 50 per cent. upon the increase of rent or not, or whether the rent had already been determined or not, and the object of the proviso (*b*) was to put them all on a footing of equality. The section is intended to act prospectively in respect to the rent from the passing of the Act, and retrospectively so as to annul the past determination so far as it applies to rent payable in the future.

[KNOX C.J. referred to *British Broken Hill Proprietary Co.* v. *Simmons* (2).]

If the Land Court had to determine the rent of the whole of the second period of the lease, it should do so as at the date when the period commenced, and evidence as to the rental value of the land at a subsequent date based on circumstances that had happened since the period commenced is irrelevant to the determination of the rent for the whole period. [Counsel also referred to *Spencer* v. *The Commonwealth* (3) ; *Liverpool Corporation* v. *Llanfyllin Assessment Committee* (4) ; *Australian Pastoral Co.* v. *The King* (5) ; *Hamer* v. *Inland Revenue Commissioners* (6).]

Woolcock and *Real*, for the respondent. The Land Court, when considering under proviso (*b*) to sec. 2 (3) of the Act of 1920 whether the rent already determined is less than a sufficient rent, has to consider any existing assessment of rent, and its determination is with regard to assessment of rent within sec. 31 (*c*) of the Act of 1910 and is appealable to the Land Appeal Court. The words " the Court " throughout proviso (*b*) have the same meaning, namely, the Court consisting of one member of the Court : otherwise appeal would be ousted in every case. The words " the period " in proviso (*b*) mean the whole of the period in respect of which the rent has already been determined, and the Act of 1920 is retrospective to that extent. The object of that Act was to put lessees whose rents

(1) (1903) 2 C.L.L.R. (Qd.), 63.
(2) (1921) 30 C.L.R., 102.
(3) (1907) 5 C.L.R., 418, at p. 440.
(4) (1899) 2 Q.B., 14, at p. 20.
(5) (1920) S.R. (Qd.), at p. 82.
(6) (1921) 1 K.B., 60.

had already been determined in the same position as those whose rents had not been determined, and to impose upon the former lessees the liability to have their rents reassessed from the beginning of the period and free from the existing restriction on the amount of increase. The words "to this extent" in sec. 2 (3) mean for the purpose of putting both classes of leases on the same footing. The Act of 1910 contemplates that the rent for each year of the period shall be the same (see secs. 40, 41, 43, 128). The decision in *Australian Pastoral Co.* v. *The King* (1) that the valuation made by the Crown is not a maximum by which the Land Court is bound is correct. [Counsel was stopped on this point.] The objection as to the admissibility of evidence goes only to the weight of the evidence. [Counsel was stopped on this point also.] Even if there were an agreement between the Crown and the lessee, the Crown could still appeal under sec. 31. It is not necessary under that section that the Crown should be aggrieved by the decision. The Minister cannot bind the Crown by promising not to exercise a discretion vested in him. The word "appeal" is wide enough to cover a right of the Crown to resort to the Land Appeal Court wherever it is thought that a mistake has been made by the Land Court, even where the decision of the Land Court gave everything which the Crown then asked for. The Act of 1910 imposes on the Land Court the duty of itself determining rent, and if by a mistake the Crown asked for less than should have been determined the Land Court is not bound by that mistake. If the Land Court determines in accordance with the mistake, the Crown may appeal. [Counsel referred to *Rederiaktiebolaget Amphitrite* v. *The King* (2); *Watson's Bay and South Shore Ferry Co.* v. *Whitfeld* (3); *Ex parte Poulton & Son* (4); *In re Marshall Hall's Copyright* (5); *Ross* v. *Smith, Timms & Co.* (6); *Gerloff* v. *Edwards* (7); *Auckland Harbour Board* v. *The King* (8); *Barrow's Case* (9); *United Grocers, Tea and Dairy Produce Employees' Union of Victoria* v. *Linaker* (10).]

(1) (1920) S.R. (Qd.), 73.
(2) (1921) 3 K.B., 500.
(3) (1919) 27 C.L.R., 268.
(4) (1884) 53 L.J. Q.B., 320.
(5) (1899) 24 V.L.R., 702; 20 A.L.T., 185.
(6) (1909) S.A.L.R., 128, at p. 132.
(7) (1917) S.A.L.R., 93, at p. 105.
(8) (1919) 38 N.Z.L.R., 419, at pp. 437-438.
(9) (1879-80) 14 Ch. D., 432.
(10) (1916) 22 C.L.R., 176, at p. 179.

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Macrossan, in reply, referred to *Ingham* v. *Hie Lee* (1); *Lauri* v. *Renad* (2); *R. S. Howard & Sons Ltd.* v. *Brunton* (3); *Queensland Trustees Ltd.* v. *Fowles* (4); *Re Macansh Estates Ltd.* (5).

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. This is an appeal by the South Australian Land Mortgage and Agency Co. from the decision of the Supreme Court of Queensland on questions of law stated by the Land Appeal Court in connection with an appeal by the Crown to that Court from the decision of the Land Court. The questions are:—[The judgment here set out the nine questions as above stated, and continued :—]

By the *Land Act* of 1910, which was an Act to consolidate and amend the law relating to the occupation, leasing and alienation of Crown land, it was provided (sec. 42) that when the term of the lease of any pastoral holding should exceed ten years the term should be divided into periods, the last period to be of such duration as would permit each other period to be of the duration of ten years. By sec. 43 it was provided that the lessee should during the term pay an annual rent at the rate for the time being prescribed, and that the rent for the second and each succeeding period should be determined by the Court (*i.e.*, the Land Court) subject to a proviso that with respect to all pastoral holdings mentioned in the Second Schedule, except when otherwise expressly stated in the said Schedule, the annual rent for each period after the first should not exceed the annual rent payable for the next preceding period by more than one-half of the annual rent payable for such preceding period. At the time when the Act of 1920 became law there were in existence leases of pastoral holdings mentioned in the Schedule to the Act of 1910 as to which there was no limitation in the amount by which the annual rent might be increased in succeeding periods, and leases as to which the limitation contained in sec. 43 applied, and in both classes there were holdings of which the annual rent for the current period had

(1) (1912) 15 C.L.R., 267.
(2) (1892) 3 Ch., 402, at p. 421.
(3) (1916) 21 C.L.R., 366, at p. 375.
(4) (1910) 12 C.L.R., 111.
(5) (1915) 6 C.L.L.R. (Qd.), 125.

been determined by the Land Court and holdings in respect of which there had been no such determination. The lessees of Hamilton Downs were entitled to the benefit of the proviso to sec. 43, and the annual rent of the holding had been determined by the Land Court on this footing at 60s. per square mile per annum for the period commencing on 1st January 1915 and ending on 31st December 1924. Sec. 2 of the Act of 1920 is in the following words :—" (1) In section forty-three of the Principal Act, the following words are repealed :—' Provided that with respect to all pastoral holdings mentioned in the Second Schedule, except when otherwise expressly stated in the said Schedule, the annual rent for each period after the first shall not exceed the annual rent payable for the next preceding period by more than one-half of the annual rent payable for such preceding period. But nothing in this section shall be deemed to limit the maximum of rent which may be determined in the event of public works being executed or extensive mineral developments occurring as hereinafter provided.' (2) In the fifth column of the Second Schedule of the Principal Act, the words ' The limitation as to increase of rent so as not to exceed by more than one-half the rent for the next preceding period does not apply,' wherever the same occur, are repealed. (3) The amendments of the said section forty-three and Schedule II. hereby made shall have effect with respect to every pastoral holding, whether the annual rent thereof has or has not been actually determined by the Court under the said section forty-three at the passing of this Act, and to this extent this enactment shall have retrospective operation : Provided that with respect to pastoral holdings the annual rent whereof has been actually so determined at the passing of this Act, whether any appeal is pending from any such determination or not—(*a*) The Governor in Council may, by notification in the *Gazette*, direct and declare that the annual rent of certain holdings mentioned in such notification is a sufficient rent for the period for which it has been so determined, in which case the Court shall not determine afresh such rent ; (*b*) In all cases except those referred to in paragraph (*a*) hereof, it shall be the duty of the Court to consider whether the annual rent of each holding for the period for which it has been determined is less than a sufficient rent, and if the Court considers that such rent is less than a sufficient rent the Court shall determine

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afresh such annual rent; and the annual rent so determined afresh shall be the annual rent for the period for which the rent is to be determined. The pastoral tenant shall forthwith pay the arrears of rent due by reason of any increase in rent under such fresh determination so as to adjust the balance due to the Crown: Provided that in any case where the Minister is satisfied that the immediate payment of the whole of such arrears would be a hardship he may accept payment thereof in such instalments as the Minister thinks just."

After this Act became law the Crown applied to the Land Court to determine afresh the annual rent of this holding for the second period of the lease which was then current. Notice of this application having been given to the lessees, the correspondence set out in pars. 9, 10, 11 and 12 of the special case passed between the lessees, the Under-Secretary for Lands and the Registrar of the Land Court. When the matter was called on in the Land Court a report and valuation made by a Commissioner for the purpose of sec. 29 of the Act of 1910 stating the fair rental value of the holding at 63s. per square mile, and the correspondence referred to above, were put in evidence, and the Court thereupon determined the annual rent for the period at 63s. per square mile.

Subsequently the Crown gave notice of appeal against this decision to the Land Appeal Court. On the hearing of that appeal the Land Appeal Court, having received further evidence of value tendered on behalf of the Crown, allowed the appeal, and determined the rent of the holding afresh at 80s. per square mile per annum for the whole period from 1st January 1915 to 31st December 1924, and subsequently stated for determination by the Supreme Court the questions set out above.

Of the questions so raised those numbered 2, 4, 5, 6 and 7 were common to this case and to cases stated in respect of the pastoral holdings known as Katandra, Sesbania and Dagworth, in connection with which similar proceedings had been taken by the Crown; and as the appeals to this Court in all four cases were argued together it will be convenient to consider these questions before dealing with the others.

Question 2.—On this question we agree with the opinion expressed

by *Shand* J., and substantially with the reasons given by him in support of that opinion.

The rules of construction to be applied in interpreting this Act of Parliament are correctly stated by him as follows (1) :—"It is not disputed that when the language of an Act of Parliament is reasonably open to two constructions, that construction should be adopted which involves the infliction of less injustice than would be inflicted by the other. But unless it can be shown that the meaning of an Act of Parliament is reasonably open to more than one construction, this proposition of law has no application. Similarly, it is not disputed that by virtue of the provisions of sec. 2 of the *Acts Shortening Act of* 1867 (and, I think, apart from these provisions), enactments should not be construed so as to give them a retrospective or retroactive operation, unless the intention to give them this operation has been clearly expressed by the Legislature. But here, again, everything depends upon the question whether the Legislature has or has not expressed a clear intention; and if it has, then effect must be given to the clearly expressed intention, no matter what the consequences may be."

The Act of 1920, on the construction put forward by the Crown, no doubt operates harshly on pastoral tenants, but we can find no ambiguity in its words. Sub-sec. 1 of sec. 2 repeals so much of the provisions of sec. 43 of the Act of 1910 as limits the amount by which the annual rent for a period succeeding the first may be increased by the Land Court. Sub-sec. 2 appears to us to do no more than remove from the Schedule of the Act of 1910 words which are rendered unnecessary by the repeal effected by sub-sec. 1, and which if left standing could have no operation whatever. Sub-sec. 3 provides that the amendment of sec. 43 made by the Act (*i.e.*, the repeal of the provision limiting the amount of increase of rent) shall have effect with respect to every pastoral holding whether the rent has or has not been determined by the Court under sec. 43, and that "to this extent this enactment shall have retrospective operation." The plain meaning of these words, applied to holdings the rent of which had not been determined before the passing of the Act, is that the rent shall be determined without regard to the

(1) (1921) S.R. (Qd.), at p. 222.

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limitation originally contained in sec. 43 and as if that section were no longer in force. And the same words, read in conjunction with the provisions for determination afresh contained in the proviso to the sub-section, appear to us necessarily to have the same meaning when applied to holdings the rent of which had actually been determined before the passing of the Act. For there is, in our opinion, no escape from the conclusion that the words of clause (*b*) of the proviso mean that the period for which the annual rent is to be determined afresh is the period for which it had been determined under the Act of 1910—*i.e.*, in this case, the whole period of ten years from 1st January 1915 to 31st December 1924.

Mr. *Macrossan* for the appellant argued that the provisions of sub-sec. 3 applied not only to holdings entitled to the benefit of the limitation imposed by sec. 43, but also to holdings to which that limitation did not apply. Assuming, without deciding, that this is so, we do not think the suggested absurdity or injustice which would flow from this construction can be used to cut down the clear meaning of the words of clause (*b*). Those words admit of only one interpretation, and, if this be so, it is not for this Court to consider what are the consequences of this construction. We are, therefore, of opinion that on this question the decision of the Supreme Court was correct.

Questions 4, 5 and 7.—Mr. *Macrossan* for the appellant did not argue before this Court the appeal against the decision of the Supreme Court on these questions ; and we see no reason to doubt that the decision of that Court was right.

Question 6.—The appeal on this point in effect challenges the correctness of the decision of the Supreme Court of Queensland in *Australian Pastoral Co.* v. *The King* (1). In our opinion that decision was correct. We can find nothing in sec. 29 which confines the discretion of the Land Court in determining the amount of rent or compensation or value of improvements within the limits of the valuations furnished by the Crown and the lessee or other person respectively.

We proceed to deal with the questions relating to the cases of Hamilton Downs (*South Australian Land Mortgage and Agency Co. Ltd.* v. *The King*) and Katandra (*Taylor and Craig* v. *The King*).

(1) (1920) S.R. (Qd.), 73.

Question 1.—The contention of the appellant on this question was that the determination afresh under sec. 2 (3) (*b*) of the Act of 1920 of the annual rent of a pastoral holding was not a power or duty which was required by sec. 31 of the Act of 1910 to be exercised or performed by one member only of the Land Court. We are unable to agree with this contention. The determination afresh of the annual rent is, in our opinion, an assessment of rent within the meaning of sec. 31 of the Act of 1910, and is therefore subject to appeal.

Question 3.—We think the duty of the Land Court under the Act is to determine as between the Crown and the lessee the amount of the annual rent of the holding on the evidence led by the parties, but with power to take evidence of its own motion for the purpose of further informing its mind on the question to be determined. In arriving at a decision it should consider and, if it thinks proper, give effect to any agreement between the parties as to the method of conducting the case or as to the evidence to be called by either party. The duty of the Land Appeal Court on a rehearing is similar to the duty of the Land Court as stated above with this addition, that it should take into consideration not only any such agreement between the parties as ought to have been considered by the Land Court but also any agreement between them relating to the conduct of the case in the Land Appeal Court. In this case, while reserving to itself the right to call for further evidence from the parties or to take further evidence of its own motion, the Land Appeal Court should have given weight to what was alleged to have taken place between the parties before and with reference to the proceedings in the Land Court. In our opinion, that Court would wisely exercise its powers by giving effect to any agreement between the parties or any inference which might properly be drawn from their conduct, except where some ground, such as fraud or mistake, on which an agreement can be set aside is shown to exist.

Question 8.—Assuming that the Crown had the right to appeal to the Land Appeal Court, it is provided by sec. 35 (8) of the Act of 1910 that the appeal to that Court shall be in the nature of a rehearing, and by sec. 35 (9) that evidence may be taken by the Land Appeal Court on an appeal. The evidence of James Ernest

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Arnold, given before the Land Appeal Court was therefore admissible, and, if believed by that Court, was sufficient to support its decision.

In the case of the *Law Debenture Corporation Ltd.* v. *The King*, relating to the pastoral holding known as Dagworth, a further question was submitted to the Supreme Court, viz., Was the Land Appeal Court right in holding that the decision of the Land Court that the annual rent determined for the second period of the lease was a sufficient rent, was appealable?

In the case of this holding the annual rent for the second period of the lease was on 23rd November 1917 determined by the Land Court to be 52s. 10½d. per square mile. On 10th March 1920, after the passing of the amending Act, the Registrar of the Land Court gave notice to the appellant that the Court would, as required by sub-sec. 3 (*b*) of sec. 2 of that Act, consider whether the rent of 52s. 10½d. per square mile per annum already determined was a sufficient rent, and that if the Court should consider that the rent was less than a sufficient rent it would determine the rent afresh. When the matter came on to be heard the Land Court did not consider that the rent already determined was less than a sufficient rent, and accordingly did not proceed to determine it afresh. It is argued for the Crown that this was a decision in respect of assessment of rent within the meaning of sec. 31 of the Act of 1910, and therefore subject to appeal; and both the Land Appeal Court and the Supreme Court upheld the contention. We are unable to agree. We think that the Court, in finding that they were unable to arrive at the conclusion necessary to give them authority to proceed to determine afresh, did not make a decision appealable under sec. 31.

ISAACS J. The main question in all these cases is how far the Act of 9th March 1920 (10 Geo. V. No. 30) is retrospective. The term "retrospective" is sometimes used in an ambiguous sense, and seldom calls for definition. Here, however, the word itself appears in the statute under consideration, and definition is necessary. I adopt the definition given by Lord *Wrenbury* (then *Buckley* L.J.) in *West* v. *Gwynne* (1), viz.: "If an Act provides that as at a past date the law shall be taken to have been that which it was not,

(1) (1911) 2 Ch., 1, at p. 12.

that Act I understand to be retrospective." I do not regard this Act as saying merely that the Land Court in assessing rents is to treat the Act as applying its amendments only to the time subsequent to the date of its passing, and leaving all earlier time to the operation of the 1910 Act as unamended. That would not be "retrospective" in the sense stated by Lord *Wrenbury*: it would be, to use his words, "interference with existing rights," but prospectively only.

At the time of passing the Act of 1920 there were, under the Act of 1910, two classes of pastoral holdings: (1) those mentioned in the Second Schedule, and (2) those arising since the commencement of the Act of 1910. The Act of 1920 began by declaring it should be "read as one with the *Land Act of* 1910." Then it proceeded to address itself to amendments which relate only to the first class mentioned, namely, "all pastoral holdings mentioned in the Second Schedule." It repealed (*a*) the provision in sec. 43 covering certain pastoral holdings in that Schedule ascertainable by inspection of the Schedule itself, and (*b*) certain words in the Schedule attached to specified pastoral holdings. Up to that point it would be a doubtful question whether the operation of the section was "retrospective" or not. Then comes sub-sec. 3, which in express terms enacts: "The amendments of the said section forty-three and Schedule II. hereby made shall have effect with respect to every pastoral holding, whether the annual rent thereof has or has not been actually determined by the Court under the said section forty-three at the passing of this Act, and to this extent this enactment shall have retrospective operation." Several expressions in sub-sec. 3 are important. The first is "every pastoral holding"; the second is "determined"; the third is "to this extent"; and the fourth is "retrospective." As to the first, I take the phrase "every pastoral holding" to be certainly limited by the Second Schedule, but I am not prepared, as at present advised, to limit it to any specific portion of the Second Schedule. It is not necessary, in the view I take, to formally decide it; the matter has not been argued in the presence of any lessee directly interested, and I shall assume, for the purposes of this judgment, that the phrase includes "every pastoral holding" in the Second Schedule. "Determined" is the

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word used in sec. 43, and seems to me to be equivalent, in that section, to the phrase "assessment of rent," just as it applies in sec. 152 to "assessment" under sec. 43 of "compensation," or in sec. 155 to "assessment" under section 43 of "the value of improvements." "To this extent" is the next phrase; and much depends on its meaning. Does it mean that the enactment in sec. 2 of the Act is to be "retrospective" to the extent of disregarding the fact of *previous actual determination*? I think it does; and I think, moreover, that that is made perfectly clear by reference to the same words in sub-sec. 2 of sec. 3, because in that sub-section there can be no other possible meaning. I desire at this point to say that I firmly adhere to the view expressed by me in *R. S. Howard & Sons Ltd.* v. *Brunton* (1), adopting Lord *Lindley's* words in *Lauri* v. *Renad* (2). But the intention of the Legislature may be made so clear, either by express language or by necessary implication, as to convince a Court, and, when that is the case, it is the duty of the Court to give effect to the will of Parliament. (See per Lord *Cozens-Hardy* M.R. in *West* v. *Gwynne* (3), per Lord *Wrenbury* (4) and per *Kennedy* L.J. (5).) And to me the conclusion I have stated is irresistible.

Now, how does it operate? There are four possible cases, viz., (1) limitation holdings where on 9th March 1920 no determination has been made, (2) limitation holdings where on that date an actual determination had been made, (3) non-limitation holdings where no determination had then been made, (4) non-limitation holdings where on that date an actual determination had been made.

(1) If the enactment is "retrospective," it must of necessity operate in the following way:—The Land Court proceeds under sec. 43 (ii.) to "determine the rent for the second period." Looking at sec. 42 and the lease, it finds the second period to be one of ten years commencing (say) at 1915 and ending at 1924. Its duty is to fix "the rent," that is—whether we regard the Act or the lease, but I prefer to regard the Act alone—"rent" to apply to that period. The meaning of the Act in requiring the rent for the first

(1) (1916) 21 C.L.R., at p. 375.
(2) (1892) 3 Ch., at 421.
(3) (1911) 2 Ch., at p. 11.
(4) (1911) 2 Ch., at p. 12.
(5) (1911) 2 Ch., at p. 15.

period to be prescribed, and leaving other periods to be dealt with by the Court, is to give stability for a sufficient period in every case, and yet allow an opportunity of correction, fair to both sides and by an impartial tribunal, when the circumstances of the State or the industry have after a sufficient time altered. Any other construction really obliterates the idea of "periods." The Land Court then proceeding in the supposed case no longer finds a limiting proviso, and so proceeds to fix the rent free from any statutory fetter. But it does so by virtue solely of the Principal Act—unamended except by elimination of the proviso. The tenant then, by the terms of the Act, is liable for "the rent"—that is, the annual "rent" so determined—for every year comprised in the period.

(2) Now, take the second case, limitation holding with rent already actually determined. What is the Court to do? The proviso declares that the Governor in Council may declare that in the case of those holdings the annual rent already determined "is a sufficient rent for the period for which it has been so determined." If he does, "the Court shall not determine afresh such rent." In that case, therefore, the original determination stands as before. But suppose the Governor in Council does not so declare. Then, by par. (*b*) of the proviso, the Court has a duty to perform; and one of the very important questions in this case is as to the nature of that duty. As stated in the language of the Legislature, it is a duty to "consider," and if the Court "considers" something, namely, that the rent already determined for the period for which it has been determined is less than sufficient, then, says the paragraph, "the Court shall determine afresh such annual rent." The clause as framed literally puts a condition precedent on the obligation or duty, for it is an obligation or duty to "determine afresh." From what I have said, to "determine" a rent is synonymous with an "assessment" of that rent. And the fact that the Court announces that it "considers" the old rent sufficient is not an "assessment" of rent. It is an announcement that it will not proceed to make an assessment. The law, then, and not the Court, provides for the result.

But that does not conclude the matter. Sec. 31 makes appealable

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a decision of the Court of one member (necessarily) "in respect of assessment of rent." On the whole, I think the Legislature meant to leave the matter to the judicial decision of the Land Court "with respect to the assessment of rent" in cases within par. (*b*). The Court, notwithstanding the informality of language, is directed to consider the assessment of the land as in fact existing, and, if it arrives at an opinion that the existing determination is sufficient, to hold its hand, and, if not, to proceed to say what the rent, in its opinion, ought to be. It is obviously, from the collocation of the words, the identically constituted Court which, in an appropriate case, both "considers, and determines afresh." I am unable to see any reason which could support the contrary view except some meaning to be found in the word "consider." But "considered" by a Court is equivalent to "adjudged" by the Court. The phrase "it is considered by the Court" was a very common form of judgment under the *Common Law Procedure Act* (see, for instance, *Chitty's Forms*, 10th ed., at pp. 64, 71, 503, 519, 521, &c.). Reading the enactment as a whole, I come to the conclusion that the Land Court, after hearing the evidence under par. (*b*), must decide, first, by stating what it "considers," as to the existing rent being sufficient or not, and, if in the affirmative, it leaves it untouched, but, if not, it proceeds to make a new determination. In either case there is a "decision" which under sec. 31 is appealable. So much in passing.

But on the main question, what is the force of the fresh determination? Is it to relate back to the earliest point of the period so as to take the place of the earlier determination entirely; or is it to replace the earlier determination from some point of time not earlier than the commencement of the new Act? I must say I can find no words which justify the Court from any standpoint in attributing the operative force of the fresh determination to 9th March 1920 as a starting-point. Determinations under the Act of 1910 do not relate back to the date of that Act; they relate back, if at all, to the beginning of the period for which they are made. If that is not the commencing point of the 1920 determination, then, it seems to me, the only other possible point is the date of the fresh determination itself. The words "the period" either mean

the whole period, or they mean the portion of the period *coincident with the existence of the fresh determination*. The word "retrospective," whatever its meaning, does not avail to carry back the fresh determination to the date of the Act, because, among other reasons, the word "retrospective" is not used in sub-sec. 3 in connection with the "fresh determination." But if the fresh determination does not simply go back to the date of the Act but goes back to the date it was made, the reference to "arrears" is nonsense. I see no reason whatever for doubting the intention of Parliament to make the fresh determination entirely supersede the old determination, and to supersede it as the rent for the relevant period in the lease, and to regard the surplus liability as arrears, subject to consideration of grace as to time of payment. The expression "shall be" the annual rent is one not of futurity but of imperative command. I, therefore, on the main question agree with the opinion of the majority of the Supreme Court of Queensland.

Several subsidiary questions present themselves.

(1) The question of whether the conclusion of the Land Court as to the insufficiency of rent is an appealable decision. I have already said that, in my opinion, it is; but that is subject to one further consideration argued before us. It was said that "appeal" was impossible because the Crown had nothing to complain of, it having suggested 63s. an acre, and that had been "agreed to" by the tenant, and so determined by the Land Court. The contention was put in two ways. First, it is said, on the proper construction of sec. 31 the appellant must be "aggrieved" even if it be the Crown. That is not, I think, a tenable proposition. "The Crown" is one possible appellant; "any party aggrieved" is another. Then it was said that "appeal" in its inherent nature connotes failing to obtain something contended for in the Court below. But that is not my view of "appeal" in its essential nature. This question involves much more serious consequences than at first sight appear. It includes, for instance, the ambit of the word "appeal" in the Federal Constitution. I therefore desire to state as precisely as the present circumstances require how I regard the contention.

There is nothing in the inherent meaning of the word "appeal"

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more than that contained in Lord *Westbury's* words in *Attorney-General* v. *Sillem* (1) : " An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below." In that statement " error " is not confined to error in law or error appearing on the record. The distinction between an " appeal " in the full sense and the limited scope of a " writ of error " is well known. I do not think it is anywhere more tersely expressed than by *Elsworth* C.J. in *Wiscart* v. *Dauchy* (2), where it is said : " An appeal is a process of civil law origin, and removes a cause entirely ; subjecting the fact as well as the law, to a review and retrial : but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law." Since the Superior Court has to decide whether there is " error " or not, it follows that the right of entering it for the purpose mentioned depends on the nature of the claim presented to that Court, and not on how it should ultimately be determined. The pronouncement of Lord *Westbury* was in 1864, when the primeval juristic meaning, if I may so term it, of the word " appeal " had undergone transformation. Originally it was used (" *appellum* " and " *appellare* ") to denote the bringing of a criminal charge against another (see, for instance, *Brooke's Case* (3)), the active party " appeals " (*appellat*) his adversary (*Pollock and Maitland's History of English Law*, 1st ed., vol. II., at p. 570). But, as pointed out by the same learned authors (at p. 661), " in the twelfth century under the influence of the canon law Englishmen became familiar with appeals (*appellationes*) of a quite other kind ; they *appealed* from the archdeacon to the bishop, from the bishop to the archbishop, from the archbishop to the pope. The graduated hierarchy of ecclesiastical courts became an attractive model. The king's court profited by this new idea ; the king's court ought to stand to the local courts in somewhat the same relation as that in which the Roman curia stands to the courts of the bishops. It is long indeed before this new idea bears all its fruit, long before there is in England any appeal from court to court." As the learned writers observe, this " appeal " from " court to court " was not known to our common

(1) (1864) 10 H.L.C., at p. 724. (2) (1796) 3 Dall., 321, at p. 327.
(3) (1587) 2 Leon., 83.

law, and did not take place until the fusion of law with equity in 1875. Equity Courts and admiralty Courts adopted it much earlier from the civil law, but common law Courts were confined to other methods, such as writs of error. The House of Lords, however, held an exceptional position; and in its famous declaration in 1675 it asserted and has since maintained its right (confirmed and regulated since by the *Appellate Jurisdiction Act* of 1876, sec. 4) as the delegate of the Sovereign to receive and determine "appeals" from inferior Courts, "that there may be no failure of justice in the land."

I apprehend from this short history of the subject there must here be given to the word "appeal" the full signification attributed to it by Lord *Westbury*. It shows also that in all but the ancient cases the right of appeal must depend on the grant of it by legislation, because it is not a common law right (per Lord *Westbury* in *Attorney-General* v. *Sillem* (1)). Any restriction may also be found in the context.

What I have said, however, is not inconsistent with a party losing the benefit of his right of appeal, where he is competent to do so, by in effect destroying the subject matter of appeal or complaint; and this I shall presently indicate. But, apart from that, and apart from any condition attached by law to the right of appeal (as, for instance, certain restrictions on the right to a writ of error or the provision in the *Common Law Procedure Act* 1854, sec. 32, as to agreement), a party is not, in my opinion, competent to restrict, any more than to enlarge, the jurisdiction of a statutory tribunal authorized to dispense the King's justice or to perform a public duty. Irregularities and often grave ones may be condoned, contractual obligations may be defined by agreement as the parties please; but the law, as I understand, is clear that no agreement can close the doors of a public Court on either of the parties. *Spurrier* v. *La Cloche* (2) states the position most distinctly. How could such an agreement be given effect to? In *Doleman & Sons* v. *Ossett Corporation* (3) *Fletcher Moulton* L.J. said:—"Speaking generally, it was not the practice of the Courts of common law to compel the

(1) (1864) 10 H.L.C., at p. 720.
(2) (1902) A.C., 446, at p. 451.
(3) (1912) 3 K.B., 257, at pp. 269-270.

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specific performance of a contract. A party to a contract might break it subject to the liability to pay damages, *i.e.*, to give full pecuniary compensation to the other party for the loss he suffered from the breach. To obtain specific performance application must be made to Chancery. But Chancery would only specifically enforce certain types of contract, of which a contract to refer to arbitration was not one. Hence a party to a contract containing an arbitration clause might refuse to perform it, and the sole remedy of the other party was an action for damages for the breach. The bringing of an action in respect of a dispute under the contract is such a breach, and the sole remedy under the common law was an action for damages, and it would still be so were it not for the provisions of sec. 4 of the *Arbitration Act* 1889. If for any reason the action is not stayed by the Court, the dispute must be decided by it. There were two competent tribunals, the Court and the arbitrator. The plaintiff contracted to choose the latter. He has in fact taken the former, and must pay the damages, if any, caused by his breach of contract. But that does not affect the fact that *the dispute is before the Court and that it can and must decide it.*" Statutory provisions cited to us, to the effect that consent orders shall not be appealable without leave, do not weaken, but, on the contrary, strengthen what I have stated. When the dispute, however, comes before the Court, it may appear that the party appellant has nothing to appeal about. I do not mean that his contention with regard to the subject matter is erroneous, but that there exists no longer that subject matter to enter upon. A private individual, for instance, may ordinarily so deal with his rights as to abandon them or destroy them. For instance, a compromise of a private right by counsel in the Court of first instance might be equivalent to the destruction of any claim to more; that is equivalent to a reconstitution of substantive rights. In *In re West Devon Great Consols Mine* (1) *Cotton* L.J. said: "Every compromise involves an undertaking not to appeal, it therefore cannot be beyond the authority of counsel to undertake that his clients shall not appeal." Then the Lord Justice, as to the point raised whether after a decision had been given on the merits such a result could follow, observes:— "As to the other point the counsel in fact says: 'The Judge

(1) (1888) 38 Ch. D., 51, at pp. 54-55.

has given a decision adverse to my client, and in consideration of his receiving his costs I undertake that he shall not appeal against it.' *That is a compromise.* The undertaking, *therefore*, is *primâ facie* binding." Now, that seems to show that the undertaking not to appeal was only looked at for the purpose of seeing whether in the circumstances it was an element in a "compromise," that is, a compromise of substantive rights. If so, it is "binding." But an agreement to arbitrate is also binding, and still does not exclude jurisdiction. The *effect* of the binding compromise is dependent on the function of the Court of appeal. The matter is very well stated and illustrated by *Miller* J. in *Dakota County* v. *Glidden* (1).

The answer to the question now dealt with (No. 1) is, therefore, that the decision of the Land Court was appealable, leaving to question 3 the consideration of two other matters, namely, the power of the Crown to compromise as to rent, and the duty of the Land Appeal Court in an appeal of this nature.

(2) Then there is a question, No. 3, in the Hamilton Downs case, in these terms: "Was the Land Appeal Court right in holding that the duty of the Land Court to determine rent is a statutory duty which cannot be restricted or affected by contract between the Crown and the lessee or by conduct of either or both, and that for the purposes of an appeal the Land Appeal Court has the same powers as the Land Court?" The meaning and extent of every question in a case stated under this Act is necessarily controlled by the case as stated. If the question is found not to be a question of law or jurisdiction, the Supreme Court or this Court cannot answer it. Sec. 36 (1) of the *Land Act* must be observed, and so must sec. 38. I read these questions as asking whether what sec. 36 (1) calls the "grounds of decision" in clauses (5) and (6) of par. 27 of the case, were correct. The "contract" and the "estoppel" set up were said to be an implied contract, and an implied representation intended to be acted on, and in fact acted on, that no appeal would be taken. The Land Appeal Court did not decide whether in truth such a contract existed, or whether the representation was in truth made or relied on. That Court said in effect that even if there were such a contract, or such a representation acted on, it was immaterial

(1) (1885) 113 U.S., 222, at pp. 225-226.

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because the Land Appeal Court had its duties prescribed by statute, and nothing done by the parties could relieve it of those duties. I entirely agree, and think it would be idle to say more as to that.

But it was argued further that the Court should have regard to such a contract or such conduct as affecting the parties themselves in the proceedings before the Land Appeal Court. Contrasting sec. 43 (i.) with sec. 43 (ii.), the scheme of the Act is to take out of the hands of the Crown the function of fixing the rent for the second and subsequent periods, either *ex mero motu* or by agreement with the tenant. For the public land, there must be paid for the second period the amount of rent determined by the Court or Land Appeal Court. No agreement will relieve that tribunal of its public duty, and no conduct on the part of the Crown can abridge the Court's duty. And further, as the Crown cannot in the first instance make a binding agreement contrary to the provisions of the Act, so neither can it convert an invalid agreement into a valid one by consenting, expressly or impliedly, to a decision based on it.

In *Great North-West Central Railway* v. *Charlebois* (1) Lord *Hobhouse* for the Judicial Committee said: "It is quite clear that a company cannot do what is beyond its legal powers by simply going into Court and consenting to a decree which orders that the thing shall be done." And their Lordships held that a judgment on an *ultra vires* contract was, though consented to, of no more validity than the invalid contract on which it was founded. That does not mean that a compromise is always impossible. Lord *Hobhouse* added: "If the legality of the act is one of the points substantially in dispute, that may be a fair subject of compromise in Court like any other disputed matter." That, of course, refers to a Court having jurisdiction to determine such a question.

In strict law the argument of the appellants is not sustainable. The Parliament of Queensland has, by sec. 6 of the Act, made every Crown lease subject to the Act. By sec. 43 it has prescribed how the rent shall be determined: and for the second and each succeeding period the rent "shall be determined by the Court"—that is (sec. 4), the "Land Court," constituted by one member, from whom an appeal lies to the Land Appeal Court of a Judge and two members of the

(1) (1899) A.C., 114, at p. 124.

Land Court other than the member appealed against (secs. 31 and 35). The Land Appeal Court hears the appeal as a rehearing (sec. 35 (8)); and by the Act of 1916 a very large power is conferred on the Appeal Court, including what is in effect original incidental jurisdiction, and by sub-sec. 9 its mode of taking evidence and its general power for the purposes of the appeal are the same as those of the Land Court. It is manifest, therefore, that, if either party is dissatisfied with the fixation of rent by the one member constituting for the purpose the Land Court, the Act places on the Land Appeal Court, more amply constituted, the very responsible duty of determining the rent for itself. Now I apply the decisions quoted, and particularly the last, in this way. It was quite open to the Crown to agree that the evidence to be laid before the Land Court should be limited to certain statements; and the Land Court, if satisfied that reliable figures were placed before it, would be quite justified in accepting and acting upon it. But that would not in the least in point of law prevent the Land Appeal Court from hearing the Crown's appeal if lawfully presented. Nor, since the Land Appeal Court has to hear the case as a rehearing, could the evidence before the Land Court bind it. The question for the Land Appeal Court is whether the decision of the Land Court was right on the real facts of the case, not whether it was right on the facts as they appeared before the Land Court; and so the Land Appeal Court must discharge its statutory duty.

But I wish to add this: though I am clear the way is quite open for the Land Appeal Court to decide notwithstanding what the Crown has said or done, yet what is said or done by either party may have a very important influence on the result. In *Dent* v. *Moore* (1) reference is made to a decision of the Privy Council there cited (*Rani Chandra Kunwar* v. *Chaudhri Narpat Singh* (2)), where Lord *Atkinson*, referring to and approving of *Slatterie* v. *Pooley* (3), after saying that although admissions made by a party, if not an estoppel, may be rebutted so as to show the admission is not true, proceeds to add: "but unless and until that is satisfactorily done, the fact admitted must be taken to be established." Now, though

(1) (1919) 26 C.L.R., 316, at p. 325.
(2) (1906) L.R. 34 Ind. App., 27, at p. 35.
(3) (1840) 6 M. & W., 664.

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this may not apply technically to the Land Appeal Court, because it has to determine what in verity is the fair rent, yet when the Crown has, in relation to the Land Court, fixed a certain sum and suggested to the tenant to accept it, and this is done, the Land Appeal Court may well require a very satisfactory explanation why the figure so acted on is afterwards departed from. In this way—the moral burden of explanation—the contract or conduct may have an important effect. But in the main sense in which the Land Appeal Court, as I think, meant the question, it seems to me that Court was quite right.

As to question 6, the answer is Yes. The valuation is intended as an assistance to the Court, not as a limitation to its powers. To suggest that it is a pleading, providing a limit to the claim of the Crown, would be not only to invent a proceeding not to be found in the Act, but it would, in effect, be enabling the Crown to do indirectly what it cannot do directly (see *Madden* v. *Nelson and Fort Sheppard Railway Co.* (1)), namely, bind itself to accept a limited rent, and bind the Court not to go beyond it.

As to the question referring to Arnold's evidence, the proper answer is Yes. The evidence given is that of a skilled person, and there is substantial material stated the weight and reliability of which is matter for the consideration of the Land Appeal Court.

As to the general question no error in law is disclosed.

In the result the appeals should, in my opinion, be dismissed.

HIGGINS J. The appellant Company holds a pastoral lease granted by the Crown under the Land Acts of Queensland for 28½ years from 1st January 1905 to 30th June 1933. The term of the lease is divided into three periods: 10 years 1905 to 1915, 10 years 1915 to 1925, 8½ years 1925 to 1933. Under sec. 43 (ii.) of the *Land Act* 1910 the rent payable for the second and third periods has to be determined by the Land Court. In determining the rent, the Land Court must pay no regard to any increase in value attributable to improvements.

The land was granted under the *Land Act* 1902. Under that Act (since repealed) there was the same provision as to periods in the

(1) (1899) A.C., 626, at pp. 626-627.

term of the leases, but there was no limitation put on the power of the Land Court to increase the rent for the second or third period. But in sec. 43 of the *Land Act* 1910—passed, of course, after the Company took the lease—there was a proviso inserted that "with respect to all pastoral holdings mentioned in the Second Schedule, except when otherwise expressly stated in the said Schedule, the annual rent for each period after the first shall not exceed the annual rent payable for the next preceding period by more than one-half of the annual rent payable for such preceding period." This lease of 1905 had the benefit of this proviso added to it by virtue of the Act of 1910. The limitation of the power of the Court to 50 per cent. increase in the rent operated so as retrospectively to benefit the lessee who had taken the lease without any such limitation. But an amending Act was passed in 1920. This amending Act repealed all the provisoes to sec. 43, as well as certain words in the Second Schedule to the Act of 1910 which became unnecessary; and it enacted (sec. 2 (3)): "The amendments of the said section forty-three and Schedule II. hereby made shall have effect with respect to every pastoral holding, whether the annual rent thereof has or has not been actually determined by the Court under the said section forty-three at the passing of this Act, and to this extent this enactment shall have retrospective operation."

I understand "every pastoral holding" to mean simply every pastoral holding. It is true that there was no need to apply the amendment to holdings which were already excepted from the benefit of the proviso to sec. 43; but the fact that the amendment was unnecessary, otiose, as to these holdings does not affect the operation of sub-sec. 3 as to the holdings which had the benefit.

I take it also that the words "shall have effect" are purely future—the effect is future; the repeal of the proviso to sec. 43 is as to the future. But it has to be remembered that both proviso and amendment are concerned, and concerned only, with the powers of the Land Court. The meaning is that as from 9th March 1920, the date of the passing of the amending Act of 1920, the power of that Court to determine the proper rent for the second or third period is not fettered by the proviso—the Court is not prohibited from determining the proper rent by the provision against exceeding

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the previous rent by more than one-half. But inasmuch as this sec. 2 (3) applies even to cases where the rent for the second or subsequent period had been actually determined already, the sub-section adds the words " and to this extent this enactment shall have retrospective operation."

Up to this point of sec. 2 (3), the intention seems clear—the land Court is not to be restricted to an increase of one-half on the previous rent, whether the rent for the period in question has been already determined or not.

But there comes a proviso to sec. 2 (3). It has been already set out in full in the judgment of the Chief Justice and *Gavan Duffy* J. In effect it says with respect to holdings the rent whereof has been determined, and whether any appeal is pending or not, (*a*) the Governor may by *Gazette* notice declare that the annual rent of any specified holding is a sufficient rent for the period, and in such case the Court shall not determine afresh any rent; and (*b*) that in all other cases the Court must consider whether the rent " for the period " is less than a sufficient rent, " and if the Court considers that such rent is less than a sufficient rent the Court shall determine afresh such annual rent; and the annual rent so determined afresh shall be the annual rent *for the period* for which the rent is to be determined "; and the pastoral tenant must pay any arrears of rent due under the fresh determination. In plain English, the Court may increase the rent if it is too low, but may not decrease it if it is too high.

In this case, the Land Court on 7th November 1917 determined the rent for the second period 1915-1925 at 60s. per square mile per annum—being one-half more than 40s., the rent payable for the first period. Under sec. 43, as it stood at that date, the Land Court could not fix a higher rent than 60s.

After the passing of the amending Act of 1920, on 27th April 1920, the Land Court, acting through one member, considering that the rent of 60s. per square mile already determined for the second period, was less than a sufficient rent, purported to determine the rent afresh at 63s. There was an appeal on the part of the Crown from this fresh determination to the Land Appeal Court; and on 22nd October 1920 that Court allowed the appeal and determined the rent

afresh at 80s. per square mile per annum. A special case was stated by the Land Appeal Court for the opinion of the Supreme Court of Queensland; and the Supreme Court, by a majority, dismissed the appeal, stating its opinion as to the various questions raised by the special case in a formal judgment, 21st July 1921. From the judgment of the Supreme Court an appeal is made to us.

This appeal is against the whole of the judgment of the Supreme Court, on the ground that it is all contrary to law; but during the argument Mr. *Macrossan*, for the appellant, abandoned the appeal as to the opinions of the Supreme Court on questions 4, 5 and 7 of the special case.

(1) In my opinion, the Supreme Court was right in holding that an appeal lay from the Land Court to the Land Appeal Court from the fresh determination of rent given by the former Court on 27th April 1920. Under sec. 27 (1) the Land Court must hear and determine all matters which by the Act or any other Act are required to be heard and determined by the Court, and by sec. 2 (3) (*b*) the Court is required to determine afresh the annual rent if it consider that the annual rent already determined is less than sufficient. Under sec. 31 the powers and duties conferred and imposed on the Court must be carried out by one member thereof "in respect of" (*inter alia*) "assessment of rent"; and "the Crown or any party aggrieved may appeal from the decision of such member in the manner hereinafter provided." The manner provided is that prescribed in sec. 35—to the Land Appeal Court consisting of a District Court Judge and two members of the Land Court other than the member who pronounced the decision.

It is urged that the appeal provisions apply only to original determinations of rent—not to "fresh" determinations under sec. 2 (3) (*b*); although the words of sec. 31, giving the powers of the Land Court to the single member, allow an appeal from his decision "in respect of . . . assessment of rent . . . where the amount is under this or any other Act to be determined by the Court." The Act of 1920 (sec. 2 (3) (*b*)) uses the words "determine afresh"; and, in the absence of plain indication to the contrary, the provisions for appeal from the decision as to assessment of

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rent in the Principal Act apply to any decision in respect of the same matter under the amending Act.

But it is urged that the Crown cannot appeal unless it be "aggrieved," and that the Crown's representative before the Land Court on 27th April 1920 either requested or consented to or made no objection to the determination of 63s. as the rent. There is no finding of fact by the Land Court as to such request, consent or attitude of the Crown's representative, and there is certainly no recital to such an effect in the formal decision of the Land Court, 14th May 1920; and by the Act the Supreme Court is precluded (sec. 36 (1)), from deciding anything that is not a question of law or jurisdiction. As a matter of construction of the words in sec. 31, "the Crown or any party aggrieved," the word "aggrieved" does not grammatically apply to the words "the Crown"; and as a matter of principle, it is, in my opinion, the duty of the Land Appeal Court to ascertain the proper rent to be paid whatever the parties or advocates before it may say. Any consensus of opinion at the Bar would naturally have weight with members of the Land Court, but it does not absolve them from their duty to make up their minds as to what is the proper rent to be paid, in justice to the public. The proceedings before the Land Court are not in the nature of a private litigation, in which the private persons may waive or give up their private rights; the proceedings are more like those of a royal commission appointed to ascertain and state the truth on a given subject for the benefit of the public.

(2) This question is the most important presented. Under sec. 2 (3) (*b*), the Court has to consider whether the annual rent for the holding is less than sufficient "for the period"—that is, the whole period—in question, and if it is less than sufficient, then to determine afresh "such annual rent"; "and the annual rent so determined afresh shall be the annual rent *for the period* for which the rent is to be determined." The pastoral tenant has then to pay the arrears of rent due by reason of the increase. The words of the clause in themselves afford no foundation that I can see for saying that the increase of rent is to be operative from the determination only; and the reasons given by *Shand* J. seem to me to be so unanswerable that it is unnecessary for me to say more. This

provision for a fresh determination, and for increase of rent if it is not sufficient, and for payment of arrears for that part of the period which has expired, probably operates harshly in some cases—particularly in cases where the lease was accepted by the lessee after the 1910 Act and before the 1920 Act—accepted on the faith of the proviso to sec. 43 which has been repealed by the 1920 Act; and *Lukin* J., who gave judgment for himself and for the Chief Justice of Queensland, was evidently deeply impressed by this harshness, and accordingly made some strong observations as to the duty of Courts not to treat Acts as retrospective if the words used can admit of any other construction. In my opinion, the words noted do not admit of any other construction than that the rent is to be determined afresh as for the whole period in question. Where the Legislature intends in the Act that increased rent, on a redetermination, shall be payable for the remainder of the term only, and not for the whole term, it uses appropriate words to that effect; as in sec. 126: "If during the term of a pastoral holding . . . any public works are executed, or extensive mineral developments occur, on or near the holding, and by reason thereof the value of the lease is, in the opinion of the Minister, enhanced, the Court . . . shall redetermine the rent . . . and the rent so determined shall thereafter be payable for *the remainder of the term.*" Moreover, the proviso to sec. 43, while it remained in force, was a mere limitation of the powers of the Land Court, and, when it was repealed, there was no longer any such limitation of the powers of that Court; and the presumption against retrospective operation does not apply to such case, even where the alteration made is disadvantageous to one of the parties. "When an Act alters the proceedings which are to prevail in the administration of justice, and makes no provision that it shall not apply to suits then pending, it shall apply" (*Wright* v. *Hale* (1); *Kimbray* v. *Draper* (2); and see *Weldon* v. *Winslow* (3); *The Ydun* (4)).

This Company—the South Australian Company—cannot, indeed, point to any harshness so far as regards an alteration in the terms of their contract after it was made; for the lease was accepted by

(1) (1860) 6 H. & N., 227.
(2) (1868) L.R. 3 Q.B., 160.
(3) (1884) 13 Q.B.D., 784.
(4) (1899) P., 236.

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the Company while there was no such limitation on the powers of the Court. The lease was accepted in 1905 ; the Legislature enacted in 1910 the limitation of the powers of the Court to one-half more rent than in the previous period ; and in 1920 the limitation was repealed. What the Legislature added to the privileges of the existing lease has been taken away by the Legislature. But I admit that this Company is entitled to make use in argument as to the construction of the Act any harshness that may be involved to other lessees by the Crown's construction.

(3) I do not think that the answer No. 3 of the Supreme Court can be sustained in its present form. The Supreme Court here states that the Land Appeal Court *would* have been right if it held &c. There has been no finding in fact of any contract or conduct on the part of the Crown as alleged by the appellant here ; and although the Supreme Court treats the allegation of contract or conduct as if it were dealing with a demurrer, I do not feel justified in saying that the duty of the Land Court to determine rent can in no possible case be affected by contract or conduct. I do not feel called on to express an universal negative. It is sufficient for the purposes of the case to say that the duty of the Land Court cannot be restricted or affected by anything that has been in this case found or alleged.

(6) In my opinion, the Land Appeal Court was not bound to treat the valuation furnished to the Court under sec. 29 on behalf of the Minister as showing the maximum rental under any fresh determination (see my answer as to finding). This was determined in the same way in the Queensland case, *Australian Pastoral Co.* v. *The King* (1). As *Lukin* J. put the matter during argument of that case (2), " May not the Land Court itself assess the amount which is correct, irrespective of the opinion of the litigants ? Is not that the duty of the Court as an independent tribunal determining the rent to be paid for public lands ? "

I concur with the judgment of the Supreme Court as to its findings (8), (9) and (10).

I understand that our judgment in this case of Hamilton Downs lease will be a sufficient guide to the parties in drawing up our

(1) (1920) S.R. (Qd.), 73. (2) (1920) S.R. (Qd.), at p. 77.

judgment in the other three cases—with the exception of one point arising in the Dagworth case (*Law Debenture Corporation* v. *The King*). It appears that in the Dagworth case, on an application made to the Land Court under the Act of 1920, that Court gave this decision: "The Land Court considers that the annual rent determined for the second period of the lease of Dagworth holding Gregory North district is a sufficient rent and accordingly determines afresh such annual rent at the rate of 52s. 10½d. per square mile per annum." This rent of 52s. 10½d. was the rent as already determined. I concur with the opinion of the Supreme Court that this decision involves a finding on the part of the Land Court that the rent already determined is not "less than sufficient," for the purposes of sec. 2 (3) (*b*) of the Act of 1920; and that an appeal lies from such a "decision" to the Land Appeal Court under sec. 31 of the *Land Act* 1910.

STARKE J. I have had the opportunity of reading and considering the judgment of my brother *Isaacs*, and I concur in it and have nothing to add.

In South Australian Land Co. v. *The King and Taylor and Another* v. *The King—Order of the Supreme Court varied by substituting for the answer to Question* 3:—"*The Land Appeal Court was right in holding that the duty of the Land Court to determine rent is a statutory duty, and that the Land Court was not restricted in the performance of that duty by the facts proved before it, and alleged in such Court on the part of the appellants to constitute an agreement, or by the conduct of either or both of the parties in such Court. The Land Court was nevertheless at liberty for the purpose of arriving at what in fact was the proper amount of rent to consider the facts aforesaid as part of the circumstances of the whole case and relevant to the*

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proper performance by the Court of its above-mentioned duty. The Land Appeal Court has the same powers as the Land Court for the purposes of an appeal." Order affirmed in other respects. Case remitted to Land Appeal Court with the opinion of this Court. In Law Debenture Corporation Ltd. v. *The King and Manifold and Others* v. *The King—Appeal dismissed with costs.*

Solicitors for the appellants, *Cannan & Peterson*, Brisbane.

Solicitor for the respondent, *W. F. Webb*, Crown Solicitor for Queensland.

B. L.

[HIGH COURT OF AUSTRALIA.]

HUNTLEY . . . . . PLAINTIFF;

AGAINST

ALEXANDER . . . . . DEFENDANT.

H. C. OF A. 1922.

MELBOURNE, *May* 10, 15.

ISAACS J.

IN CHAMBERS.

Practice—High Court—Jury—Order for trial with jury—Discretion—Action for breach of promise of marriage and seduction—High Court Procedure Act 1903-1921 (*No.* 7 *of* 1903—*No.* 35 *of* 1921), *secs.* 12, 13—*Rules of the High Court* 1911, *Part I., Order XXXIII., r.* 2.

The fact that an action in the High Court is one for breach of promise of marriage and seduction is not in itself a ground for ordering that the action be tried with a jury.

Gardner v. *Jay*, (1885) 29 Ch. D., 50, applied.

SUMMONS.

An action was brought in the High Court by Eva Huntley, a resident of Victoria, against William Telford Alexander, a resident