[HIGH COURT OF AUSTRALIA.]

MAJOR . . . . . APPELLANT;
DEFENDANT,

AND

BRETHERTON AND ANOTHER . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Tort — Action for deceit — Fraudulent misrepresentations — Lease — Guarantee — Collateral agreement — Warranty — Damages.

High Court Practice — Concurrent findings — Trial Judge — State appellate Court — Appeal to High Court.

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May 10, 11, 14, 15; *June* 7.

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

In an action in the Supreme Court for damages for fraudulent misrepresentations inducing one of the plaintiffs to enter into an agreement in writing to lease a theatre and the other plaintiff to guarantee in writing the payment of the rent thereof, and also for damages for breach of a verbal warranty collateral to the lease, the trial Judge found for the defendant on the issue as to the fraudulent misrepresentations, and as to the claim for breach of warranty he held that the defendant did not intend and was not understood to intend to give any further promise than was contained in the lease. On appeal the Full Court agreed with the trial Judge as to the misrepresentations, but held that the evidence established the collateral verbal warranty and that it was intended to be legally binding and entered judgment in favour of the plaintiffs for damages for breach of the warranty. On appeal to the High Court,

Held, that there was evidence justifying the decision of the trial Judge, and that the appeal should be allowed.

Per Isaacs J.: In an appeal to the High Court on the facts where there are concurrent findings by the trial Judge and the State appellate Court, the High Court should not interfere with those findings unless it is clearly convinced that the findings are erroneous.

Judgment of the Full Court of the Supreme Court of Victoria in part reversed and judgment of *Dixon* A.J. affirmed.

APPEAL from the Supreme Court of Victoria.

In an action brought by Albert Wilbur Bretherton and Dora Louise Bretherton in the Supreme Court against Edward Harold Major, the plaintiffs sought to recover damage for false and fraudulent misrepresentations which they alleged had been made by the defendant, whereby the plaintiff Mrs. Bretherton had been induced to enter into a lease of the Cremorne Theatre, Brisbane, and the plaintiff Dr. Bretherton had been induced to guarantee in writing the payment by her of the rent of the theatre, and alternatively for damages for breach of a verbal warranty collateral to the lease—the plaintiffs alleging in their statement of claim that the defendant had verbally promised and warranted to the plaintiffs, in consideration of their promising to enter into the lease and the guarantee respectively, that he had control of the Bohemia Theatre, Brisbane, and that such theatre would not during the term covered by the lease be used as a theatre or in opposition to the Cremorne Theatre.

The action was heard by *Dixon* A.J., who gave judgment for the defendant.

From this decision the plaintiffs appealed to the Full Court of the Supreme Court, which by a majority (*Irvine* C.J. and *Cussen* J., *McArthur* J. dissenting) ordered that the judgment in the Court below be set aside, and that it be referred to the Chief Clerk to hold an inquiry to ascertain the amount of damages on breach of warranty suffered by the plaintiff Dora Louise Bretherton; and, after such inquiry, the Court ordered judgment to be entered for her for £250 damages and for Albert Wilbur Bretherton for one shilling damages for breach of warranty.

From the judgment of the Full Court the defendant and the plaintiffs (by cross-appeal) now appealed to the High Court.

Further material facts and the arguments are sufficiently indicated in the judgments hereunder.

Ham K.C. (with him *Ah Ket*), for the appellant, Major.

Hogan (with him *Montefiore*), for the respondents, Albert Wilbur Bretherton and Dora Louise Bretherton.

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June 7.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. The respondents sued the appellant in the Supreme Court to recover damages for fraudulent misrepresentations whereby they were induced to enter into certain agreements, and alternatively for damages for breach of a verbal warranty collateral to a lease entered into between the appellant as lessor and the respondent Dora Louise Bretherton as lessee. The action was tried on oral evidence before *Dixon* A.J., and he held (1) as to two of the misrepresentations alleged, that the respondents had failed to prove that they were made, (2) as to another of the alleged misrepresentations, that the appellant believed that the statement made was true ; (3) as to the remaining alleged misrepresentation, that it was substantially though not literally true and that it was not made fraudulently. With reference to the claim for breach of warranty he held that the appellant did not intend and was not understood to intend to give any further promise than was to be found in the written lease. On these findings he gave judgment for the present appellant.

An appeal to the Full Court of the Supreme Court by the present respondents was allowed, the majority of the learned Judges in the Full Court (*Irvine* C.J. and *Cussen* J., *McArthur* J. dissenting), being of opinion that the evidence established a collateral verbal agreement intended to be legally binding to the effect alleged in the statement of claim, allowed the appeal and entered judgment for the present respondents. All the members of the Court agreed with the decision of *Dixon* A.J. on the issue of fraudulent misrepresentation. Both parties appeal from the decision of the Full Court.

Although the learned trial Judge did not state expressly either that he accepted or that he did not accept the evidence of any particular witness, it is clear that his findings were and must have been based on the view which he entertained of the credibility of the several witnesses examined before him. Having had the advantage of hearing the evidence given and observing the demeanour of the witnesses, he arrived at the definite conclusions of fact stated above, and there was evidence justifying such conclusions.

In these circumstances we think that his decision on all the matters at issue between the parties should have been accepted by the Full

Court, and that the defendant's appeal should be allowed, the cross-appeal dismissed, and the judgment of *Dixon* A.J. restored.

We should add that in the course of the argument before this Court Mr. *Hogan* for the respondents applied for leave to amend the statement of claim so as to raise the question whether the respondents were entitled to relief on the footing that the appellant had committed a breach of the implied promise referred to by our brother *Starke* that he would retain control of the Bohemia Theatre during the currency of the lease. The Court refused to allow such an amendment to be made at that stage of the case and left the respondents to take such other proceedings as they might be advised.

ISAACS J. The respondents sue in tort for false and fraudulent representations causing damage. They also sue for breach of warranty constituted by an oral contract, the consideration they gave being the entering into contracts of lease of the Cremorne Theatre, Brisbane, and of guarantee respectively.

I deal with the claim on contract first. The warranty relied on is an undertaking by the appellant that the Bohemia Theatre would not during the currency of the lease be used as a theatre or in opposition to the Cremorne Theatre. It is necessary to remember that the respondents have to establish an agreement to that effect, which, "not being an essential part of the contract either intrinsically or by agreement, is collateral to the main purpose of" the contracts referred to (*Dawsons Ltd.* v. *Bonnin* (1)). It is also to be borne in mind that any words amounting to a representation or assertion as to an event, present or future, if they appear either expressly or inferentially to have been given and acted on as an acceptance of responsibility in case the representation or assertion proves untrue, are sufficient to constitute a warranty (*Schawel* v. *Reade* (2) ; *Heilbut, Symons & Co.* v. *Buckleton* (3)). The point at issue is whether such a warranty has been established. That the question is by no means easy of determination is shown by the hesitancy felt by the learned primary Judge (*Dixon* A.J.) and by the division of opinion in the Full Court of Victoria. I have arrived at the conclusion that the respondents have failed to maintain the

(1) (1922) 2 A.C. 413, at p. 422. (2) (1913) 2 I.R. 64 (H.L.).
(3) (1913) A.C. 30.

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case set up, by reason of two circumstances, or, perhaps, of the combination of two circumstances. The first is the opinion of the learned primary Judge. I do not regard his opinion as based on a bald rejection of the relevant testimony that supported respondents' case. Such a rejection would have been the end of the matter, and there would have been no ground for his hesitation. There is consequently room for the appellate Court to form its own estimate. But in forming its estimate as to whether the communings of the parties amounted to a giving and taking of the appellant's responsibility in case the Bohemia Theatre was used as an opposition theatre, some weight at least must be given to the way in which the evidence was given and the impression it conveyed to the presiding Judge. Mr. *Hogan*, however, contended that the circumstances were so strong as to overcome that advantage of the primary tribunal, and to entitle the respondents to maintain the judgment of the Supreme Court. This brings in the second circumstance that influences me. I recognize at once that all three members of the Full Court thought that the appellant had given a promise which would in itself be sufficient to constitute a warranty. It is not, of course, disputed that the majority (*Irvine* C.J. and *Cussen* J.) so held. But also *McArthur* J. so considered. Speaking of the third proposal made during the negotiations with respect to Bohemia, the learned Judge said : " Thirdly, that Bohemia should (if opportunity occurred) be let as a shop or garage—or for some purpose which would not bring it into opposition with Cremorne—and that the rent received for Bohemia should be applied in reduction of the rent of Cremorne." As to this purpose, *McArthur* J. thus states his conclusion :—" The last proposal was assented to, and the effect of it was—and was, I think, intended to be—not only that Cremorne should get the advantage of any rent received for Bohemia, but that the defendant should (by necessary implication) be under an obligation to retain the lease of Bohemia, so that it would be available for letting if opportunity occurred. And the effect of this no doubt would be that Bohemia would not be used in opposition to Cremorne." It is therefore clear that the Full Court thought the evidence was sufficient to establish the necessary promise. Their Honors diverged, however, at a point. The

majority thought the promise was intended as collateral, and could stand without incorporation into the main contract; the minority thought the promise was intended to be essential and to be matter for rectification. I do not stop to inquire what course my own mind would take if I reached the same point as their Honors, namely, that the necessary promise had been made. That is to say, I do not express any opinion as to whether, having found the necessary materials for doing justice, I should think the evidence compelled me to delay that justice and to remit the parties to further cumbersome litigation, or whether it would have justified me in agreeing with the answer of the majority to the second question propounded in the judgment of *Cussen* J. But I am not able to reach that point. On principle the evidence is not satisfactory. In *Heilbut, Symons & Co.* v. *Buckleton* (1) Lord *Moulton*, with the approval of Lord *Haldane* L.C., said :—"Such collateral contracts, the sole effect of which is to vary or add to the terms of the principal contract, are therefore viewed with suspicion by the law. They must be proved strictly. Not only the terms of such contracts but the existence of an *animus contrahendi* on the part of all the parties to them must be clearly shown." The only testimony adduced for the purpose is oral. The inferiority of oral evidence for the purpose is recognized in *Jacobs* v. *Batavia and General Plantations Trust* (2). The difficulty is enhanced by the nature of the case. The warranty alleged is really a variation of the written contract of lease. The clause in that contract relating to the deduction of rent if the Bohemia Theatre be let, does not restrict the purpose for which the lessor might let it. There is, no doubt, an implied covenant by the lessor that he will not disable himself from carrying out the promise therein expressed, but the promise does not limit the scope of his letting. I do not agree with the contention that the construction of the clause is to be altered by reason of the negotiations. That would be a fundamental error. The warranty therefore varies the right of the lessor as that would exist under the contract. The presumption is strong that a written contract is the conclusive record of the agreement of the parties with respect to its subject matter, and consequently that it is the exclusive

(1) (1913) A.C., at p. 47.

(2) (1924) 2 Ch. 329, at pp. 336, 338.

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evidence of that agreement. The more formal, precise and detailed the written contract, the stronger is the presumption and the more difficult to overcome by oral testimony. I regard it as a highly dangerous course for a Court to take, to sanction the virtual variation of written contracts, and even contracts under seal, by controverted oral evidence, unless supported by circumstances of the clearest and most convincing character.

I think the learned primary Judge was fully justified in arriving at his conclusion, and combining, as I have said, what is inherent in that conclusion with the principle stated, I am of opinion the original judgment was correct on this branch of the case.

As to the claim for deceit, the argument was confined to the allegation of misrepresentation that one Hanna had been and was paying £85 a week as rent for the said theatre. The learned primary Judge absolved the respondent and the Full Court sustained his findings, the majority adopting his reasons. Before this Court a highly important question was started, and for the first time definitely in this Court, as to the duty of the Court in view of there being concurrent findings of fact on this claim for deceit. The recent case of *Robins* v. *National Trust Co.* (1) was referred to by my brother *Starke*, and the subject is much too important to be left unconsidered. In that case the Privy Council, speaking by Viscount *Dunedin*, extended to appeals from all parts of the Empire a rule of conduct guiding the practice of the Judicial Committee itself, which previously had been applied only to appeals from India. Their Lordships do not declare that rule of conduct to be applicable to local appellate tribunals. Lord *Dunedin* says truly that the rule has gradually developed. I regard the decision as a further conscious step in the evolution of the inter-Imperial relations among the members of the British Commonwealth of Nations, analogous to and consonant with their development in other departments of government. The rule itself, it is expressly stated, is left without exhaustive definition, though there is, to my mind, a tendency to limit in questions of pure fact the intervention of His Majesty in Council, which is "an act of grace" (*Canadian Pacific Railway* v. *Toronto Corporation and Grand Trunk Railway*

(1) (1927) A.C. 515.

of Canada (1)), to cases of miscarriage of justice and violation of principles of law or of procedure. If that be so, the development of the rule has gone beyond the mere extension of the field of its operation. In prior cases the exceptions to the rule were more widely stated. For instance, in *Ram Anugra Narain Singh* v. *Chowdry Hanuman Sahai* (2), a case referred to in *Robins' Case* (3), the judgment of Sir *John Bonser* for a Board including Lord *Macnaghten* and Lord *Lindley*, stated at p. 308 of the latter report the "well-known rule of this Board that such a finding will not be disturbed unless it be shown to be clearly erroneous." That view, for all I can tell, may still be part of the rule. Whether it is or not is beyond my province to inquire, except for the purpose of endeavouring faithfully to follow any direction intended to be given to this Court. In this aspect only, I observe that in one of the passages quoted by Lord *Dunedin* (*Moung Tha Hnyeen* v. *Moung Pan Nyo* (4)), reference is made to "the valuable principle . . . commonly observed in second Courts of appeal, that such a Court will not interfere with concurrent judgments of the Courts below on matters of fact, *unless very definite and explicit grounds* for that interference are assigned" (5). If the rule as stated in *Ram Anugra's Case* still prevails, it approaches very closely to what I have always understood to be the proper rule guiding this Court in similar circumstances. If, however, the rule as now adopted be more restricted, then I am the more firmly satisfied that their Lordships did not intend to do more than state the attitude of the Judicial Committee as the final tribunal of the Empire. This Court stands in a wholly different position. It has an obligatory jurisdiction in this case, and the appellant comes before it not as of grace, but as of right, as of constitutional right, unimpaired, as it might have been, by any Australian legislation. *Robins' Case* does, however, contain one passage of commanding importance. Lord *Dunedin* says of the House of Lords (6): "That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it."

(1) (1911) A.C. 461, at p. 470.
(2) (1902) 30 Ind. App. 41 ; 30 Calc. L.R. 303.
(3) (1927) A.C. 515.
(4) (1900) L.R. 27 Ind. App. 166, at p. 167.
(5) (1927) A.C., at p. 518.
(6) (1927) A.C., at p. 519.

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The point now in question is covered by a decision of the House of Lords which I have, apart from the distinct ruling of the Privy Council, always considered as governing the matter. In *Owners of the P. Caland and Freight* v. *Glamorgan Steamship Co.* (1) we find both the statement of the rule and an instance of its application. Lord *Herschell* L.C., with reference to disturbing current findings, said (2):—"I think such a step ought only to be taken when it can be *clearly demonstrated that the finding was erroneous*. . . . I am not prepared to advise your Lordships that it *so unequivocally* inclines in the opposite direction to that indicated in the judgments of the Courts below, that this House would be justified in reversing the judgment appealed from." Lord *Watson* said (1):—"It is a salutary principle that Judges sitting in a Court of last resort ought not to disturb concurrent findings of fact by the Courts below, unless they can arrive at—I will not say a certain, because in such matters there can be no absolute certainty—but *a tolerably clear conviction* that these findings are erroneous. And the principle appears to me to be specially applicable in cases where the conclusion sought to be set aside chiefly rests on considerations of probability." His Lordship proceeds to apply the rule. He says he is not prepared to affirm that he would have decided as the other Courts did. But as their decision was, in his opinion, "as likely to be right as a finding the other way," he acts on the rule. Lord *Ashbourne* says (3) he would not differ "without clear and strong reasons." Lord *Morris* concurred. The authority of that case with respect to the rule is recognized in the *Hatfield* (*Owners*) v. *Glasgow* (*Owners*) (4), where, however, though two Courts found the *Hatfield* to blame, the House of Lords held the findings were not, in the circumstances, concurrent within the meaning of the rule. In the present circumstances it would be not only unnecessary, but out of place, to inquire further. There is the rule, and I have only to follow it. By following it, I do not mean that as soon as I see there are concurrent findings I abstain from forming my own opinion. I am bound to consider the evidence and to form my own opinion consistently with judicial obligation and precedent. But when I have

(1) (1893) A.C. 207, at p. 216.
(2) (1893) A.C., at p. 215.
(3) (1893) A.C., at p. 217.
(4) (1914) 84 L.J. P. 161.

done so, the rule comes into play, and, unless I reach the point of clear conviction predicated by the House of Lords in the *P. Caland Case* (1), the appeal should, in my opinion, fail.*

With this principle in hand, I consider the facts as to deceit. It is essential to the appellant's success that he should convince this Court of the fraudulent mind of the respondent in making the representation complained of, even assuming all else in the appellant's favour. If Major honestly believed he was substantially stating the truth, no matter how unreasonable the grounds for his belief, he was not fraudulent. In that case, the claim for deceit must fail, even assuming the actual statement made was not true. *Dixon* A.J. had the great advantage of observing Major, who appears to have admitted very frankly the actual statements alleged that Hanna paid the rent. But while that was admitted, Major gave what he regarded as his explanation of the position, and the learned trial Judge could alone form what Lord *Sumner* in *s.s. Hontestroom* v. *s.s. Sagaporack and s.s. Durham Castle* (2) calls the "estimate of the man." Giving full weight to the circumstances relied on for appellant, they are in no way powerful enough to outweigh the advantage possessed by the learned trial Judge, even if we were sitting as a first Court of appeal (see the cases collected in *Federal Commissioner of Taxation* v. *Clarke* (3)), and still less as a second Court of appeal (*P. Caland Case* (1)).

On this branch of the case the judgment of the primary Court should be restored.

The appeal as a whole should be allowed.

HIGGINS J. On the mere question of fact—was there a contract of warranty as alleged—my difficulty has been to find any sufficient reason for setting aside the finding of the primary Judge, who saw and heard the witnesses. There is evidence, certainly, of Dr. Bretherton that the defendant undertook to keep the Bohemia Theatre shut during the duration of the lease of the Cremorne Theatre to the plaintiffs; but this evidence is denied by Major

(1) (1893) A.C. 207. (2) (1927) A.C. 37, at p. 47.
(3) (1927) 40 C.L.R. 246, at pp. 263-266.
*See also *Minneapolis Steel Co.* v. *Baxter*, (1927) 3 D.L.R. 97.—*I.J.*

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and by Marcel; and the Judge was not bound to accept the evidence as being precisely accurate or even as true. In his statement of the facts as found by him, the alleged promise is not found; and that should be sufficient under ordinary circumstances. It is interesting to notice in the closely reasoned judgment of *Cussen* J., speaking for the majority of the Full Court, the stress laid on the fact that, without the alleged contract, the defendant "could, the day after the lease of the Cremorne Theatre was signed, have surrendered or forfeited his tenancy of Bohemia and would still be entitled to claim the full £85 per week rent though this amount was admittedly made up in part by including £30 in respect of Bohemia." This is, no doubt, a relevant consideration; but no one, probably, would say that it is sufficient to justify a Court in saying that the contract must have been made although the Judge who saw and heard the witnesses did not find that it was made. The weight of the consideration would largely depend on the character and business capacity of the bargainers; and the primary Judge has seen and heard them. I have expressed myself recently on the subject in the case of the *Federal Commissioner of Taxation* v. *Clarke* (1) (and see *Dominion Trust Co.* v. *New York Life Insurance Co.* (2); *Admiralty Commissioners* v. *s.s. Volute* (3)). As for the particular possibility that Major might allow the lease of the Bohemia to be forfeited or surrendered, the rent of £85 payable by the plaintiffs remaining the same, it may well have been that the plaintiffs thought Major's self-interest would prevent him from forfeiting or surrendering—his keen desire to keep the Bohemia closed in the interest of the Cremorne; for he had to look for income from the Cremorne after the plaintiffs left as well as during their term. In the very protracted evidence the primary Judge had exceptional opportunities, which the Full Court had not, and which we have not, for considering the weight to be attached to the witnesses; and he came to the conclusion that Major "clearly intimated and the plaintiff A. W. Bretherton understood that the said contract between him, his wife and the defendant was to be contained in the documents. The defendant did not, I think,

(1) (1927) 40 C.L.R. 246.
(2) (1919) A.C. 254.
(3) (1922) 1 A.C. 129, at p 135.

intend and was not understood to intend to give any further promise than was to be found in the lease." Why should we not accept this finding of fact? *McArthur* J., who gave a dissenting judgment in the Full Court, has reminded us of the difficulties and dangers incident to the proof of such alleged collateral contracts, when the main contract is in writing, and has cited Lord *Moulton's* words in *Heilbut, Symons & Co.* v. *Buckleton* (1). Nor, as the learned Judge has shown, is it sufficient even to prove words that might indicate certain intentions in the discussion of a proposed contract: it must be shown that the parties intended to create a legal obligation collateral to their written contract—that there was an *animus contrahendi* on the collateral matter.

In my opinion, the appeal must be allowed and the finding of *Dixon* A.J. restored as to the contract of warranty alleged.

As to the count for deceit—fraudulent representation—I have had more difficulty; although the Judge of first instance and the members of the Full Court concurred in dismissing the count. I cannot, indeed, in the space that I can reasonably take, do full justice to the mastery of his facts displayed by Mr. *Hogan*, counsel for the plaintiffs, on this count as well as on the other. But I confess that I was much impressed by the admission of Major, that he spoke of one Hanna as lessee of the Cremorne, and as paying £85 rent for the Cremorne and for the Bohemia. This statement was *à propos* of the complaint that £85 per week was "very hot"—excessive; and it might be regarded as an intimation to the Brethertons that Hanna preceded them as lessee, and independently consented to such a rent, and yet made profit. It looked like the common argument of boom times—"What's good enough for Hanna is good enough for you." Yet Hanna was not lessee: Major was lessee, and Hanna was his manager at a salary, with a share in the profits. But the relations of the parties were complicated, and the primary Judge found that the statement was not *fraudulently* made by Major; and fraud is necessary to the proof of the count. Dr. Bretherton, it is true, swears that he would not have signed the guarantee if Major had not made "the representations" (there were several alleged); but here again the finding of the Judge is

(1) (1913) A.C. 30.

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that " so much of the statement " of Major " as did not correspond with fact did not, in my opinion, afford an inducement " for the contract.

My opinion is therefore that on the count for deceit the judgment of the Full Court should stand.

As my conclusion is in favour of the appellant on these grounds it is unnecessary for me to consider the effect of the recent decision of the Judicial Committee of the Privy Council in *Robins* v. *National Trust Co.* (1) as to concurrent judgments of the Court below on matters of fact. The attitude of the Judicial Committee as the final tribunal of the Empire as to its own practice is not necessarily to be the attitude of this Court; and the question whether we shall treat ourselves as being subject to such a rule in our endeavours to do justice after weighing all the circumstances of the case before us should not be decided until the subject has received much more attention than has been possible in this case. In my opinion, the question should be left open until such a decision becomes necessary.

STARKE J. I agree with the judgment of the Chief Justice and my brother *Gavan Duffy*. I wish, however, to add two observations. Firstly, the concurrent findings of fact by the learned trial Judge and by the Full Court are practically decisive upon the count for deceit in this action (cf. *Robins* v. *National Trust Co.* (1)). Secondly, *Cussen* J. was greatly influenced, I think, by his view that " as the lease is drawn unless the alleged contract (i.e., the verbal warranty collateral to the lease) is given effect to, the defendant could the day after the lease of Cremorne was signed have surrendered or forfeited his tenancy of Bohemia and would still be entitled to claim the full £85 per week rent though this amount was admittedly made up in part by including £30 in respect of Bohemia." The clause the learned Judge refers to reads thus: " Should the lessor succeed in letting the theatre known as Bohemia Theatre Brisbane all rent received by the lessor from the said Bohemia Theatre during the currency of this lease shall be from time to time allowed to the lessee and deducted from the rent reserved and payable by the lessee under this lease." I am not disposed, as at present advised,

(1) (1927) A.C. 515.

to agree with the learned Judge in his construction of this clause. Cases such as *The Moorcock* (1) suggest that there is implicit in this stipulation a promise that the lessor would maintain control of Bohemia Theatre for the purpose of letting it during the currency of the lease. The plaintiffs have not made this case by their pleading and we cannot adjudicate upon it. Mr. *Hogan* applied for leave to amend, but it is too late at this stage of the case to make such an amendment and his clients must be allowed to commence other proceedings if so advised.

Appeal allowed. Cross-appeal dismissed. Judgment of Dixon A.J. restored.

Solicitor for the appellant, *Albert E. Jones.*

Solicitors for the respondents, *P. J. Ridgeway & Schilling.*

(1) (1889) 14 P.D. 64.

[HIGH COURT OF AUSTRALIA.]

AUSTIN PASTORAL COMPANY OF BRINGAGEE LIMITED . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

Income Tax (Cth.)—Assessment—Sale of station—Discontinuance of business—Proceeds of sale of sheep — Realization of capital — Assessable income — "Trading stock" — "Live-stock used for breeding purposes" — Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *secs.* 4, 17.

By sec. 4 of the *Income Tax Assessment Act* 1922-1925 "'Trading stock' means anything produced . . . for purposes of . . . sale." By sec. 17 it is provided that "(1) the proceeds derived from the sale of the whole