[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . } APPELLANT;

AND

YEEND . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1929.

SYDNEY, *Nov.* 18; *Dec.* 2.

Knox C.J., Isaacs, Gavan Duffy, Rich and Dixon JJ.

Stamp Duties (N.S.W.) — Agreement from racing club granting sole right to sell refreshments on course—Implied use of club's premises—Neither "property" nor "conveyance"—Executory contract—"Sale of . . . right not before in existence"—Stamp Duties Act 1920-1924 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 32 *of* 1924), *secs.* 3, 41 (1), 65, 71.

An agreement between a racing club and S. conferred on the latter, for valuable consideration, the sole right of supplying, at prices fixed by the club, all the refreshments, eatables and drinkables to be sold or disposed of within two reserves during race meetings to be held on the club's course for a period of three years. All plant, &c., was to be supplied by S., and it was implied that he should have the use of the club's refreshment rooms. It was a term of the agreement that no subletting or assignment of interest would under any circumstances be allowed unless written permission be granted for same by the chairman of the club. The right was reserved by the club to enter and view the refreshment rooms at any time and to take such steps as appeared necessary from time to time to secure the proper management and control of the business. Y., with two other persons, entered into a joint and several bond with the club to secure the due performance by S. of the contract. S. died, and by an agreement between Y. and the club it was arranged that Y. should carry out the terms of the original agreement in the place of S., the currency thereof being extended for a further three years.

Held, that the agreement was not within sec. 41 (1) or sec. 65 of the *Stamp Duties Act* 1920-1924 (N.S.W.) because it was an executory contract giving rise to a mere personal right of selling refreshments with ancillary stipulations. Such a right was not "property" within the meaning of the Act, and therefore

H. C. OF A. 1929.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. YEEND.

the agreement was not liable to *ad valorem* duty appropriate to a conveyance. Nor was the agreement within sec. 71, as there was neither a sale nor a right within the meaning of that section.

Decision of the Supreme Court of New South Wales (Full Court) affirmed.

APPEAL from the Supreme Court of New South Wales.

A special case, which was substantially as follows, was stated by the Commissioner of Stamp Duties for the opinion of the Supreme Court under sec. 124 of the *Stamp Duties Act* 1920-1924 (N.S.W.):—

1. The Australian Jockey Club, an unincorporated body, is the owner in terms of sec. 9 of the *Australian Jockey Club Act* 1873 of certain land situated at Warwick Farm near Sydney, and known as the Warwick Farm Racecourse and thereon holds meetings for the purpose of horse-racing.

2. In the month of July 1925 the Club invited tenders for the right of selling refreshments in luncheon, oyster and tea rooms and bars within the grandstand reserve and the St. Leger reserve on the said racecourse for the balance of the period of three years ending on 31st December 1927.

3. On 20th July 1925 Charles Smith (now deceased) tendered for such right, and on 24th July 1925 the committee of the Club, by Charles William Cropper, secretary of the Club, accepted such tender.

5. *Ad valorem* conveyance duty at the rate of 15s. for every £100 and part of £100 of the consideration therefor was duly paid in respect of the contract constituted by the said invitation to tender, the said tender and acceptance.

6. By bond dated 4th August 1925 the above-named Charles Smith (now deceased), Richard Gaut (now deceased) and Charles Henry Yeend became, pursuant to the said contract, jointly and severally bound in the sum of £500 to the chairman of the committee of the Club by way of security for the performance by the said Charles Smith of the said contract.

7. Richard Gaut died on 10th April 1927 and probate of his last will was duly granted on 19th September 1927 by this Honourable Court in its probate jurisdiction to Perpetual Trustee Co. Ltd. and Rosanna Yeend.

8. Charles Smith died on 11th December 1927 and probate of his last will was duly granted on 19th January 1928 by this Honourable Court in its probate jurisdiction to Georgina Evelyn Smith, the sole executrix and sole beneficiary therein named.

9. By agreement dated 1st March 1928 made between Charles Henry Yeend of the first part, Edgar Davies and Rosanna Yeend of the second part, Georgina Evelyn Smith of the third part and the chairman of the committee of the above-named Club of the fourth part, and intended to be annexed to and read with the said bond of 4th August 1925, it was recited that the said contract referred to in par. 4, which it had been agreed should be extended for three years from 1st January 1928, had been transferred to and was then vested in Charles Henry Yeend as contractor (as Georgina Evelyn Smith did thereby acknowledge), and it was further recited that it had been agreed between the parties thereto that Charles Henry Yeend should continue to carry out the contract in the place and stead of Charles Smith.

10. The said agreement dated 1st March 1928 stated that it was agreed that the term of the said contract referred to in par. 4 be extended for the further term of three years from 1st January 1928 upon such and the same terms and conditions and subject to the same provisions and agreements as were by the said bond and contract expressed and contained, and so that all such terms, conditions, provisions and agreements should remain in force and take effect in like manner as if the said contract had been originally entered into by Charles Henry Yeend as contractor for the full term expiring on 31st December 1930; and Charles Henry Yeend covenanted with the chairman of the Australian Jockey Club to carry out the said contract upon the terms and conditions set out therein.

12. The sum agreed to be paid for the right of selling refreshments in the said grandstand reserve and St. Leger reserve at the race meetings held in each year of the term of three years created by the agreement dated 1st March 1928 was £300 per meeting. In the year 1928 the number of race meetings held at Warwick Farm Racecourse was nine.

H. C. OF A. 1929.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. YEEND.

13. The Commissioner claimed that the agreement dated 1st March 1928 was liable to *ad valorem* conveyance duty at the rate of 15s. for every £100 and also for any part of £100 of the consideration therefor, which he claimed to be the sum of £8,100, and assessed duty accordingly at the sum of £60 15s.

14. Charles Henry Yeend duly paid the said sum of £60 15s. under protest and, having duly paid the sum of £20 as security for costs, called upon the Commissioner to state this case.

15. Charles Henry Yeend claims that the agreement of 1st March 1928 is liable to the fixed duty of 1s. only.

The questions for the decision of the Court were as follows:—

(1) Is the said agreement liable to *ad valorem* conveyance duty?

(2) If not, is the said agreement liable to any other and, if so, what duty?

(3) How are the costs of this case to be borne and paid?

The agreement made between the Australian Jockey Club and Charles Smith (the predecessor of Yeend) referred to in pars. 2 and 3 of the case stated provided that the successful tenderer was to have the sole right of providing all refreshments, eatables or drinkables, to be sold or disposed of within the grandstand reserve and the St. Leger reserve during the meetings (approximately eight per annum) of the Club on the Warwick Farm Racecourse or any other club to which the committee might sub-let the course for the period of the agreement. The successful tenderer was to provide all plant required for the business; eatables and drinkables were to be of the best description and in sufficient quantities, and were to be supplied to the public at prices imposed by the Club and as set out in the schedule. The Club reserved the right to enter and view the refreshment rooms at any time, and to take such steps as appeared necessary from time to time to secure the proper management and control of the business. It was also a term of the agreement that no sub-letting or assignment of interest would, in any circumstances, be allowed, unless written permission be granted thereto by the chairman for the time being of the Club.

The Full Court answered question 1 in the negative, and question 2 by saying that 1s. duty was sufficient.

From that decision the Commissioner now, by special leave, appealed to the High Court.

Other material facts appear in the judgments hereunder.

Thompson, for the appellant. The matter is governed by sec. 41 (1) of the *Stamp Duties Act* 1920-1924. The only case where stamp duty is not payable is when the agreement is for the sale of goods, wares and merchandise. Here the transaction is a sale of rights, what is offered is a tender, and is "property" within the definition of the Act, which is the widest that could possibly be made and corresponds with the definition of "property" as appearing in the *Conveyancing Act* 1919 (N.S.W.). Although the licence granted in *Conservators of River Thames* v. *Commissioners of Inland Revenue* (1) was held not to be "property," that case is distinguishable because, unlike the New South Wales Act, the English Act contains no definition of "property," which doubtless accounts for the decision of the Court. The agreement between the parties here confers the right to assign, the right to occupy and the right to sell, and, therefore, must be "property" within the meaning of the Act. Very specific property was involved in *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (2). If the transaction does not come within sec. 41 of the Act, then, alternatively, it comes within sec. 71, as being the creation of a right not previously in existence within the meaning of that section. The right to enter land and sell goods is a right in the nature of property and is valuable. As to what is "property," see *Encyclopædia of Forms and Precedents*, 2nd ed., vol. XIII., p. 662.

Lamb K.C. (with him *Alroy Cohen*), for the respondent. It is obvious that some limitation must be placed on the wide words of sec. 65, and it is for the Court to say what that limitation should be. There is no difference between this particular contract and any ordinary catering contract, that is to say, a contract to cater for a dinner at a private house. The limitations should be those imposed by the Supreme Court. As to whether the right is an interest in land and therefore "property," see *Frank Warr & Co.* v. *London*

(1) (1886) 18 Q.B.D. 279. (2) (1872) L.R. 7 Ex. 211.

H. C. OF A. 1929.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. YEEND.

Dec. 2.

County Council (1). Sec. 71 has no bearing on the matter except as to the form of the document. [He was stopped.]

Thompson, in reply.

Cur. adv. vult.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY, RICH AND DIXON JJ. The question raised by this appeal is whether an agreement in writing, between a caterer and a racing club, relating to the supply of refreshments to the public, is liable to the *ad valorem* stamp duty specified by the Second Schedule of the *Stamp Duties Act* 1920-1924 for " conveyances of any property." The agreement provided that the caterer, who is the respondent, should have the sole right of supplying " all the refreshments, eatables and drinkables to be sold or disposed of within the grandstand reserve and the St. Leger reserve " during race meetings to be held upon the Club's course for a period of three years. The caterer was required to supply his own plant and to provide the public with food and drink of the best quality and in sufficient quantities at prices specified in the agreement. It is implied that he shall have the use of the Club's refreshment rooms. The agreement regulates his duties in respect of some details, and it provides that no " sub-letting or assignment of interest will under any circumstances be allowed unless written permission be granted for same by the chairman " of the Club. It is quite clear that the agreement does not entitle the caterer to obtain exclusive possession of any part of the Club's premises for any time, however short. Besides undertaking the duty of providing for the public, the caterer agreed to pay to the Club the sum of £300 in respect of every race day.

The appellant, the Commissioner of Stamp Duties, claims the *ad valorem* duty appropriate to a conveyance under one or other of three distinct provisions of the *Stamp Duties Act* upon which he relies.

His first contention is that when sec. 65, which describes what the word " conveyance " shall include, is interpreted by the definition of the word " property " contained in sec. 3, it applies to the written

(1) (1904) 1 K.B. 713.

agreement in question. Sec. 3 defines the word "property" to include "real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest": a definition which was adopted from the *Conveyancing Act* 1919. Sec. 65 defines the meaning of the word "conveyance" to include a catalogue of instruments "whereby any property . . . is . . . vested in or accrues to any person." Applying to this provision the definition of "property," the Commissioner maintains that the agreement between the caterer and the Club is an instrument whereby a right or interest in New South Wales is vested in or accrues to the caterer. We think a safe way of ascertaining the meaning of sec. 65, as affected by the definition of "property" in sec. 3, is to read and interpret the section as if that definition were written at length into it. So reading it, sec. 65 would run: For the purposes of this Act the expression "conveyance" includes any transfer, lease, assignment, exchange, appointment, settlement, surrender, release, foreclosure, disclaimer, declaration of trust, and every other instrument (except a will), and every decree or order of any Court whereby any property in New South Wales including real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest is transferred to or vested in or accrues to any person. Wide as must be the operation of a provision thus expressed, it seems unnatural to apply its words to a document which does no more than describe mutual promises although they result in contractual rights. In this case the document expresses an ordinary simple contract, executory on both sides. Each contracting party incurred obligations to the other. A "right" to the performance of those obligations was, of course, created in the other, subject to his readiness and willingness to perform his own obligations. But the section relates to instruments by which the right is vested in or accrues to a person. This expression is appropriate enough to proprietary rights, but not one which may aptly be applied to the right to enforce an executory contract contained in the document. If this provision bore the wide meaning which the argument attributes to it, secs. 41 (1) and 71 would be superfluous. It is worth notice that, while decrees

H. C. OF A. 1929.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. YEEND.

Knox C.J. Gavan Duffy J. Rich J. Dixon J.

and orders are included in the definition of "conveyance," judgments are not. A decree or an order may vest property as that expression is ordinarily understood. But a judgment ordinarily creates a right—a right to enforce the payment of a sum of money by some person. The right is correlative to an obligation—a personal obligation. Such rights arise out of many relations, but it would not be usual, when the relation is established by a document, to speak of such a right as one which was vested in or accrued to a person by the instrument. Indeed, an inspection of the Second Schedule to the Act will show that nearly all the various documents other than "conveyance" there specified might be brought within the phrase if it received so extensive a meaning. We think that, if sec. 65 is read with the definition of "property" written in it, no one would naturally understand the words "instrument whereby any property in New South Wales including any right or interest is vested in or accrues to any person" to apply to the mere contractual right of a party to an executory contract in writing. It seems unnecessary and undesirable to attempt to formulate the limitations which must be placed upon the generality of the language contained in the definition of "property." It is enough to say that sec. 65 cannot by its aid be extended to such a contract as we have described.

The Commissioner's second contention was that the instrument fell within sec. 41 (1). This sub-section provides: "Every agreement for the sale or conveyance of any property in New South Wales shall be charged with the same *ad valorem* duty to be paid by the purchaser or person to whom the property is agreed to be conveyed as if it were a conveyance of the property agreed to be sold or conveyed and shall be stamped accordingly." This provision relates to instruments, which do not themselves operate to sell or "convey" "property" within the meaning given to that word by sec. 65, but which contemplate a future sale or conveyance. The contract between the Club and the caterer contains nothing in the nature of an agreement for a future "conveyance," however large a meaning be given to the word "conveyance." The words "every agreement for the sale . . . of any property in New South Wales" although read as including any

right or interest, appear to us quite inappropriate to describe the contract between the Club and the caterer. The caterer's rights would not ordinarily be described as rights arising under an agreement for their sale to him, nor would he be described as a purchaser.

The Commissioner relied for his third contention upon sec. 71. That section is as follows: "Where upon the sale of any annuity or other right not before in existence such annuity or other right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract, or otherwise, the bond or other instrument, or some one of such instruments, if there is more than one, is to be charged with the same duty as a conveyance." The critical words in this provision are "where upon the sale of any . . . other right not before in existence." We think "sale of a right" is an expression which could not be properly used to describe the promises made by the Club, although part of the consideration for which they were given was a promise to pay sums of money. There was neither a sale, nor a right, within the meaning of the section.

For these reasons we think that the judgment of the Supreme Court was right and that the appeal should be dismissed.

ISAACS J. The question for determination is whether an agreement dated 1st March 1928, and made between the Australian Jockey Club and the respondent, is liable to *ad valorem* conveyance duty or other duty under the *Stamp Duties Act* 1920 as amended by the Act of 1924.

By force of sec. 4 and of the Second Schedule to the Act, duty is chargeable in respect of every conveyance of any property. If otherwise than on sale or exchange, the duty is *ad valorem* simply; if on sale or exchange, then the duty is primarily on the amount or value of the consideration, and if the value of the property conveyed is greater than the consideration, then—apart from shares—the duty is *ad valorem*. It is thus seen that there are two essentials: (1) conveyance and (2) property. The argument satisfies me that it is necessary to consider separately the two conceptions although the word "conveyance" connotes the presence of "property."

H. C. OF A. 1929. COMMISSIONER OF STAMP DUTIES (N.S.W.) v. YEEND. Isaacs J.

As to conveyance, sec. 65 is the main section, and by it the term "conveyance" includes every instrument (except a will) whereby any property in New South Wales is "transferred to or vested in or accrues to" any person. If an instrument answers the description so far stated, it is a "conveyance." There is a supplementary but independent provision contained in sec. 41 whereby agreements for sale or conveyance of property in New South Wales are taxable as if they were conveyances. The fundamental difference between an agreement to convey and a conveyance is referred to by Lord *Sumner* in delivering the judgment of the Privy Council in *Stamps Commissioners* v. *Queensland Meat Export Co.* (1). Sec. 71 is another supplementary and independent section applying to the "sale" of a non-pre-existing right, not created by actual grant or conveyance, but, of course, necessarily created in some way and only "secured" by some collateral instrument. There the collateral instrument of security is chargeable with duty as if it were a conveyance. Secs. 41 and 71 are precautionary provisions to prevent mere departure from the form of a conveyance enabling one to escape from the Act. But neither of these sections is applicable here, because when tested by the terms of sec. 65 and Lord *Sumner's* judgment (2), the agreement dated 1st March 1928, the instrument under consideration, is in form a "conveyance" within the meaning of the Act. No further or other instrument of title was contemplated or indeed possible to vest in the respondent the right sold to him. The only further legal element necessary to constitute it a "conveyance" within the meaning of sec. 65 is that the right it vests should be "property" in New South Wales.

The crucial question then is: Is that subject matter "property" within the meaning of the Act? The definition is very wide, since it "includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest." From the fact that "property" is the matter defined, that the last word is "interest," and from a careful inspection of the terms of the Second Schedule under the

(1) (1917) A.C. 624, at p. 628. (2) (1917) A.C., at p. 628.

heading " Conveyances of any Property," and with the additional light given by the use of the word " right " in sec. 71, it is clear to me that the word " right "—which is the word relied on by the Commissioner in this case—must be confined to a right in the nature of property as ordinarily understood. Indeed, Mr. *Thompson*, in his courageous argument, frankly admitted so much. But he contended that the right of catering, to which the respondent became entitled under the agreement, was in the nature of property. The test in every such case must be whether the " right " which is either " transferred to " or " vested in " or " accrues to " the alleged taxpayer, is a *personal right* or a *property right*. It is not, in my opinion, material whether it is created by the agreement or not. That is not the standard. Sec. 71 confirms that view. The standard is the inherent nature of the right that is the immediate subject matter of the agreement. That subject matter may in a given case pre-exist or it may not, the only essentials are that it is " property " and that it is transferred to, vested in or accrues to some person. If it is not in itself property, attempted assignment carries it no further. Assignability is a consequence, not a test (see *Sports and General Press Agency Ltd.* v. " *Our Dogs* " *Publishing Co.* (1).

Without going back very far in the history of the matter, there are some very recent and quite decisive authorities. One is *King* v. *David Allen & Sons, Billposting, Ltd.* (2). A, in July 1913, made a contract with B, permitting the latter to affix posters and advertisements to the flank walls of a picture house to be erected on his property by a company to be formed for four years, at a rent of £12 a year, A agreeing not to permit any other person during the period to affix any advertisement to the walls. The company was formed, took a lease of the premises from A, with full knowledge of the agreement, and even agreed with him to take an assignment of the billposting agreement—but no actual assignment was executed, and the lease did not refer to the billposting agreement. The company entered into possession, built the picture-palace, and refused permission to B to post advertisements. The House of Lords had to consider whether the right conferred by A on B was

(1) (1917) 2 K.B. 125. (2) (1916) 2 A.C. 54.

H. C. OF A. 1929. COMMISSIONER OF STAMP DUTIES (N.S.W.) v. YEEND. Isaacs J.

personal only or was an estate or interest in the land. It was held to be "nothing but a personal obligation." That depended on the construction of the agreement, and, as Lord *Buckmaster* L.C. said (1), the matter does not depend on the terms attached to the parties as "licensor and licensee" or as "lessor and lessee." The substance of the agreement determines the result. On the other hand, the cited case of *Sports and General Press Agency Ltd.* v. "*Our Dogs*" *Publishing Co.* (2) in the Court of Appeal shows that an exclusive right of taking photographs is not a form of property known to the law. And then there is the case of *Joel* v. *International Circus and Christmas Fair* (3) before the Court of Appeal (Lord *Sterndale* M.R. and *Warrington* and *Scrutton* L.JJ.). A person applied for and obtained space in the fair at 6d. a foot frontage, and the nature of the agreement was construed by *Eve* J., as the primary Judge, and afterwards by the Court of Appeal, as one giving the applicant an interest in the property. The Court of Appeal were of opinion that it was merely upon the true construction of the contract that the case depended, the claim being for an injunction in the way of specific performance. They distinguished (*inter alia*) *Frank Warr* v. *London County Council* (4) and other authorities.

No doubt in the case of a personal right an injunction may be granted to prevent a breach of contract, but not in the way of specific performance (*James Jones & Sons Ltd.* v. *Earl of Tankerville* (5)). The distinction is clear between the personal right and the property right. The latter alone falls within the statute in hand. There is nothing intermediate, and ultimately the question depends on construction of the instrument as to which category it comes under.

The agreement of 1st March 1928 confers a mere personal right of selling refreshments with ancillary stipulations. That is the right which "vests in" or "accrues to" the respondents by the instrument. But since that right is not in the nature of property —but in the same category as *King* v. *David Allen & Sons,*

(1) (1916) 2 A.C., at p. 59.
(2) (1917) 2 K.B. 125.
(3) (1920) 124 L.T. 459.
(4) (1904) 1 K.B. 713.
(5) (1909) 2 Ch. 440, at p. 443.

Billposting, Ltd. (1)—the case is outside the definition of property, and the respondent succeeds.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Macnamara & Smith.*

J. B.

(1) (1916) 2 A.C. 54.

Foll *Mc & Angus Pty Ltd, Re* (1992) 7 ACSR 748

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES). . . . APPELLANT;

AND

PERPETUAL TRUSTEE COMPANY LIMITED RESPONDENT.

(SAXTON'S CASE.)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Stamp Duties (N.S.W.)—Dutiable estate—Gift made within three years before death —Shares in company issued to members of deceased's family—Payment therefor by company's cheque debited to deceased's account in company's books—Subsequent transfer of such debits to accounts of said members of deceased's family in said books—Retransfer thereof to deceased's said account within three years of his death—Pro rata extinguishment of debts by pre-existing credit balance—Stamp Duties Act 1920-1924 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 32 *of* 1924), *sec.* 102 (2) (*b*)*.

S., who died on 30th September 1926, was a large shareholder in, and also life managing director of, a limited company which by its articles conferred

*Sec. 102 of the *Stamp Duties Act* 1920-1924 (N.S.W.) provides that "For the purposes of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property:— . . . (2) . . . (*b*) Any property comprised in any gift made by the deceased within three years before his death . . . including any money paid or other property conveyed or transferred by the deceased within such period in pursuance of a covenant or agreement made at any time by him without full consideration in money or money's-worth" &c.