[HIGH COURT OF AUSTRALIA.]

STEPHEN . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . RESPONDENT.

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SYDNEY, *Nov.* 17, 18; *Dec.* 8.

Isaacs C.J., Rich, Starke and Dixon JJ.

Land Tax (Cth.)—Freehold and leased lands—Used by club as race-courses—Partly occupied by necessary buildings—Public admitted on payment—"Public recreation ground"—Land not owned by State or public authority—Owner of leasehold estate under State law relating to alienation or occupation of Crown land—Fee simple—Restrictions imposed by grant—Effect on unimproved value—Lands licensed as race-courses—Effect on unimproved value—"Similar interest"—Land Tax Assessment Act 1910-1930 (*No.* 22 *of* 1910—*No.* 8 *of* 1930), *secs.* 3, 13 (*a*), (*g*) (3), (*g*) (7), 27, 28, 29—*Australian Jockey Club Act* 1873 (*N.S.W.*)—*Gaming and Betting Act* 1912-1927 (*N.S.W.*) (*No.* 25 *of* 1912—*No.* 31 *of* 1927), *sec.* 51 (1).

In 1863 the Crown granted land to trustees to be used for public recreation, with power to them to lease it for a term not exceeding seven years for (*inter alia*) a public race-course; the *Australian Jockey Club Act* 1873 (N.S.W.) empowered the trustees to lease the land for twenty-one years for the same purposes, and pursuant to this power they leased the land to the Australian Jockey Club for use (*inter alia*) as a race-course. The Club used it as a race-course, to which the public were admitted on payment. By-laws were made by the Club regulating the use of the race-course and the charges for admission, and providing for various privileges for and restrictions upon members and others.

The *Land Tax Assessment Act* 1910-1930, by sec. 3, provides that "'Unimproved value' in relation to improved land, means the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that . . . the improvements did not exist."

Held, by *Isaacs* C.J. and *Starke* J. (*Rich* and *Dixon* JJ. dissenting), that the fee simple to be valued is the estate subject to the conditions and restrictions in the grant.

Armidale Race-course Trustees v. *Armidale Municipal Council*, (1923) 6 L.G.R. (N.S.W.) 151, and *Goulston* v. *Valuer-General*, (1924) 7 L.G.R. (N.S.W.) 17, considered.

Held, that the lease to the Australian Jockey Club had an unexpired period for the purpose of the calculations mentioned in sec. 27 (3), (4), of the *Land Tax Assessment Act* 1910-1930.

Clark Tait & Co. v. *Federal Commissioner of Land Tax*, (1929) 43 C.L.R. 1, discussed.

Held, also, that the land was not solely used as a public recreation ground within the meaning of sec. 13 (*g*) (7) of the *Land Tax Assessment Act* 1910-1930.

Held, further, that the Club was not the owner of a leasehold estate in the land under the laws of New South Wales relating to the alienation or occupation of Crown lands within the meaning of sec. 29 of the *Land Tax Assessment Act* 1910-1930.

Held, further, that exemption from taxation under sec. 13 (*a*) of the *Land Tax Assessment Act* 1910-1930 could not be granted because the land was not owned by a State or by a public authority of a State.

On the race-course the Club erected stands and other buildings to part of which the public were admitted on payment. The Club is not carried on for pecuniary profits.

Held, further, that the race-course was not used solely as a site for the "buildings" occupied by the Club, and therefore the land on which the buildings stood was not exempted from taxation by sec. 13 (*g*) (3) of the *Land Tax Assessment Act* 1910-1930.

The land was licensed as a race-course under sec. 51 (1) of the *Gaming and Betting Act* 1912-1927 (N.S.W.).

Per Rich and *Dixon* JJ., (1) that the fact of the licence was not to be taken into account as enhancing the value of the land when ascertaining its unimproved value; (2) that the licence amounted to or created in the land "a similar interest" within the meaning of those words in the definition of "value of improvements" in sec. 3 of the *Land Tax Assessment Act* 1910-1930.

CASE STATED.

On the hearing of an appeal to the High Court by Colin Campbell Stephen, chairman of the Australian Jockey Club, from an assessment of the Club by the Federal Commissioner of Land Tax for land tax for the year ending 30th June 1927 in respect of certain freehold and leasehold lands respectively owned or held by the Club, a case, which was, so far as material, as follows, was stated for the opinion of the Full Court:—

1. The appellant is the chairman of the Australian Jockey Club which is a club formed in or about the year 1840, and has since its

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formation been continuously carried on for purposes of horse-racing in accordance with the Act, rules and by-laws from time to time in force, and is not carried on for pecuniary profit.

2. Pursuant to the powers conferred by the *Crown Lands Alienation Act* 1861 (N.S.W.) by Crown grant dated 15th June 1863 there was granted to certain persons all that piece or parcel of land containing about 202 acres at Randwick to hold unto the said persons their heirs and assigns for ever for the purposes of a race-course, training ground, cricket ground, rifle butts and for any other public amusement or purposes upon the terms and conditions including those of reservation and resumption for public purposes and forfeiture in the said grant set forth.

3. On 20th November 1873 it was enacted by the *Australian Jockey Club Act* 1873 (N.S.W.), *inter alia*, that it should be lawful for the trustees for the time being of the said grant, and they were thereby authorized by writing, to grant to the Australian Jockey Club or to any other club or association for the purposes of horse-racing or for the purposes of promoting or engaging in any other public amusement or purpose for which it was intended the said land should or might be used as aforesaid, the exclusive right to use and occupy the said lands or any part or parts thereof as the said trustees should in their discretion think fit for any number of years not exceeding twenty-one years, with power to renew the same.

4. Pursuant to the powers in the said grant the Crown resumed out of the said 202 acres $4\frac{1}{2}$ acres or thereabouts for public roads. On 4th February 1920 the then trustees under the said grant leased the said land, which then consisted of 197 acres 2 roods $36\frac{1}{2}$ perches, unto the chairman of the Committee of the Australian Jockey Club and his successors in office for the term of twenty-one years at the yearly rent of one peppercorn if demanded, but nevertheless for the purposes of the said Act and subject to the conditions, reservations and provisoes in the said Crown grant and the covenants, conditions and restrictions in the said lease mentioned. The land the subject of the said lease consists of parcels numbered 29 and 30 in the return hereinafter mentioned. The Australian Jockey Club has at all times duly complied with the conditions of the said lease.

5. The Australian Jockey Club uses, and at all material times used, the said land solely as a site for a race-course and as a training ground for the purpose of training horses intended to race, to which the public are admitted on payment. The said land has at no time been used for purposes other than those in par. 2 hereof mentioned. Such land is licensed and has at all material times been licensed as a race-course under the provisions which are contained in sec. 51 of the *Gaming and Betting Act* 1912-1927 (N.S.W.).

6. Upon the said land are erected buildings and things including (*inter alia*) two cottages for caretakers, judge's box, grandstands, tearooms for members and the public, car stalls, horse stalls, turnstiles, lavatories, offices, workshops, sheds and tote-dividends offices. The land on which the said buildings and things stand is occupied by the Australian Jockey Club solely as a site for such buildings and things; the said buildings and things stand within the saddling paddock, St. Leger reserve, Flat reserve, horse paddocks or other enclosures. The areas occupied by the said buildings and things exclusive of any surrounding land and the areas within which the said buildings and things stand vary in accordance only with the building or thing erected or standing thereon. The buildings and things mentioned herein are used in the usual manner and for the usual purposes commonly associated with such buildings and things.

7. The Australian Jockey Club is also owner for an estate in fee simple of certain land containing 355 acres or thereabouts on which is situate Warwick Farm Racecourse. The said land consists of parcels 22 to 27 in the return hereinafter mentioned. The said land is used solely for the purposes of a race-course and a training ground for race-horses, to which the public are admitted on payment. Such land is licensed and has at all material times been licensed as a race-course under the provisions which are contained in sec. 51 of the *Gaming and Betting Act* 1912-1927.

8. On the said Warwick Farm Racecourse are erected the buildings and things including (*inter alia*) four cottages for caretaker and other employees, official stands, grandstands and lawn, turnstiles, horse stalls, totalisators, judge's box, lavatory, casualty room and veterinary hospital, stables, workshops and parking areas. The land on which the said buildings and things stand is occupied by

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the Australian Jockey Club solely as a site for such buildings and things. The said buildings and things stand within the saddling paddock, St. Leger reserve, members and public parking areas or other enclosures. The areas occupied by the said buildings and things (exclusive of any surrounding land) and the area within which the said buildings stand vary in accordance only with the building or thing, erected, standing or being thereon. The buildings and things mentioned herein are used in the usual manner and for the usual purposes commonly associated with such buildings or things.

9. The Australian Jockey Club is owner for an estate in fee simple of (*inter alia*) the parcels numbers 2 to 6 and 9 inclusive in the return hereinafter mentioned. The said parcels are and were at all times occupied and used as hereinafter stated.

10. Parcels 2, 3 and 9 were used only as an exit from or as entrances to Randwick Racecourse and there are no buildings erected upon the said parcels 2, 3 and 9.

11. On parcel 5 is erected a cottage which is and was occupied rent free by the race-course manager for the purpose of conveniently performing his duties in connection with Randwick Racecourse.

11A. Parcel 4 was used for the purposes described in par. 5 hereof, and there are no buildings erected upon the said parcel.

12. On parcel 6 is erected a cottage which is and was occupied rent free by the race-course plumber for the purpose of conveniently performing his duties in connection with Randwick Racecourse.

13. The Australian Jockey Club at the request of the Commissioner of Land Tax furnished a return under the *Land Tax Assessment Act* 1910-1927 setting forth all land owned by it as beneficial owner or leased to it as at midnight on the 30th day of June 1927. (The return showed, in addition to the parcels referred to herein, certain other parcels of land owned by the Australian Jockey Club, more in the nature of investments than for race-course purposes, except one parcel at Bligh Street, Sydney, on which the office of the Club was erected.)

14. The Commissioner of Land Tax assessed the Australian Jockey Club in respect of the above-mentioned parcels of land and on 4th January 1930 the Australian Jockey Club duly objected to

the said assessment on the grounds that the subject lands were exempt from taxation and that the assessment was excessive.

15. The Commissioner of Land Tax considered and disallowed the said objection. The Australian Jockey Club, being dissatisfied with the decision of the Commissioner on the said objection, requested him to treat the said objection as an appeal and to forward it for hearing to the High Court.

16. The Australian Jockey Club contends that parcels 2 to 6, 9, 22 to 27, 29 and 30 are wholly exempt from taxation under the *Land Tax Assessment Act* 1910-1927 or, in the alternative, that those portions of parcels 22 to 27, 29 and 30 upon which the buildings mentioned in pars. 6 and 8 hereto are erected and the land appurtenant thereto are exempt from taxation thereunder. The Commissioner of Land Tax contends to the contrary.

The following questions were stated for the opinion of the High Court :—

(1) Are any, and if so which, of the parcels numbered 2 to 6, 9, 22 to 27, 29 and 30 in the said return or what parts thereof liable to taxation under the *Land Tax Assessment Act* 1910-1930 ?

(2) (*a*) Was there any, and if so what, unexpired period of the lease of the land consisting of parcels numbered 29 and 30 within the meaning of sec. 28 (3) (*a*) of the said Act ? (*b*) Having regard to the terms, conditions and limitations of the lease mentioned in par. 4 of this case, is the said lease within the operation of sec. 27 or sec. 28 (2) and (3) of the *Land Tax Assessment Act* 1910-1930 and, if not, is the said lease liable to be taxed under any other provisions of the said Act ?

(3) In ascertaining whether the land consisting of parcels numbered 29 and 30 has any and what unimproved value for the purpose of sec. 27 or sec. 28 (3) (*a*), should the fee simple referred to in the definition in sec. 3 of the *Land Tax Assessment Act* 1910-1930 be taken to be a fee simple unencumbered by the conditions of the Crown grant and the *Australian Jockey Club Act* 1873 and by the lease

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mentioned in par. 4, or a fee simple subject to all or some and which of those conditions and/or such lease or how otherwise ?

(4) Is the fact that the land consisting of parcels numbered 29 and 30 and the land consisting of parcels numbered 22-27 are respectively licensed as race-courses under sec. 51 (1) of the *Gaming and Betting Act* 1912-1927 (N.S.W.) to be taken into account as enhancing in each case the value of such land in ascertaining its unimproved value ? In particular does such licence amount to or create in the land "a similar interest" within the meaning of those words in the definition of the "value of improvements" in sec. 3 of the *Land Tax Assessment Act* 1910-1930 ?

Other material facts are stated in the judgments hereunder.

Lamb K.C. (with him *A. M. Cohen*), for the appellant. The appellant is exempt from taxation under sec. 13 of the *Land Tax Assessment Act* 1910-1928 and also under secs. 27, 28 and 29 of the Act. All the buildings erected on the subject land are "owned and occupied" by a club within the meaning of sec. 13 (*g*) (3) of the Act. There are no means of ascertaining the taxable value of the leasehold estate under sec. 27 because the basis for such valuation, as shown in sub-sec. 4, cannot be determined. If the subject lands come within sec. 29, then neither sec. 27 nor sec. 28 applies. Crown lands vested in trustees or other bodies, with a power of leasing, remain Crown lands. A right to lease was conferred in the grant. The unimproved value must be found under sec. 27 or sec. 28. For the purpose of ascertaining the unimproved value of leasehold estate under sec. 27, it is necessary to calculate the annual value of the land for the unexpired period of the lease, and the unexpired period of the lease is unascertainable, for the Crown may resume possession at any time (*Clark Tait & Co.* v. *Federal Commissioner of Land Tax* (1)). The amendments made to the *Land Tax Assessment Act* 1910-1928 by Act No. 1 of 1930, sec. 3, do not apply to sec. 27 of the Principal Act. The owners of the freehold are the trustees who have no beneficial

(1) (1929) 43 C.L.R. 1.

occupation. For taxation purposes the fee simple has nothing to do with the value of the land but regard must be had to any restrictions that may affect the land. The method of valuation is the same whether it be for rating or resumption purposes (*MacDermott* v. *Corrie* (1)). Land cannot be taken in abstract. As to the consideration to be given to restrictions, see *Burns* v. *Allen* (2). Sec. 27 shows that, in apportioning, the owner's fee simple must be taken subject to restrictions. The trustees cannot sell. As to how to arrive at the unimproved value of land, see *Commissioner of Land Tax* v. *Nathan* (3), which was considered in *Toohey's Ltd.* v. *Valuer-General* (4). So far as the appellant's freehold land at Warwick Farm is concerned, the question of valuation depends upon whether it comes under sec. 13 (*g*) (7).

Jordan K.C. (with him *Pitt*), for the respondent. Land is not a legal concept: it is the substance. The Act distinguishes between the land and the fee simple thereof. The first requirement is to ascertain the physical substance and the second is to ascertain how much could be got for the fee simple. In a particular case there may be no fee simple. Unimproved value simply means what the land ought to fetch if it could be sold, that is, if it were competent to be sold and someone would bid for it. The Court has not to consider whether the land could or could not be sold (*Moran* v. *Commissioners of Taxation* (5) ; *Armidale Racecourse Trustees* v. *Armidale Municipal Council* (6)). In *Ford* v. *Valuer-General* (7) the restrictions did not run with the land. Under the relevant Act of New Zealand, only the owner's interest has to be valued (*Thomas* v. *Valuer-General* (8)). Another case where restrictions were eliminated from consideration is *Goulston* v. *Valuer-General* (9). The effect of the *Valuation Act* is to change the mode of valuation (*In re Hutt Park and Racecourse Board* (10)). In ascertaining the capital value whether or not there is a fee

(1) (1913) 17 C.L.R. 223; (1914) A.C. 1056; 18 C.L.R. 511.
(2) (1889) 10 N.S.W.L.R. (Eq.) 218.
(3) (1913) 16 C.L.R. 654.
(4) (1925) A.C. 439; 25 S.R. (N.S.W.) 75.
(5) (1898) 19 N.S.W.L.R. (L.) 189, at p. 191.
(6) (1923) 6 L.G.R. (N.S.W.) 151.
(7) (1924) 6 L.G.R. (N.S.W.) 179.
(8) (1918) N.Z.L.R. 164.
(9) (1924) 7 L.G.R. (N.S.W.) 17.
(10) (1907) 27 N.Z.L.R. 246, at p. 251.

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simple is not considered, but a fee simple value must be considered. It is only potentialities at the 30th June in each year that can be taken into consideration. The Crown can release the restrictions imposed by it. Sec. 48 draws a distinction between the land and an interest therein. The Crown owns land, but it does not hold in fee simple. As regards sec. 13 (*g*) the trustees do not occupy the site solely as a site for a public reserve, &c. The trustees do not use or occupy the land nor do they occupy the land as a public recreation ground within the meaning of sec. 13 (*g*) (7). The lease granted to the Club is not a lease from the Crown, and the trustees do not represent the Crown in any way or for any purpose whatsoever. The fact that the trustees get no benefit is immaterial (*Mersey Docks and Harbour Board Trustees* v. *Cameron* (1)). This lessee is not in any different position from that of any other lessee in New South Wales. A valuation of the fee simple free from restrictions can be obtained by following any one of five different principles.

[DIXON J. referred to *Sendall and Crace* v. *Federal Commissioner of Land Tax* (2).]

As to what is a public recreation ground, see *Municipal Council of Sydney* v. *Royal Agricultural Society of New South Wales* (3). If the Crown dedicated the land for public recreation and appointed trustees without powers or duties, then the land would remain Crown land.

Lamb K.C., in reply. It is impossible to arrive at the value of land without considering its possible uses. In the abstract land has no value. The fee simple may be subject to restrictions by grant or statute. The distinction between voluntary and statutory restrictions are dealt with in *Trustees of the Royal Agricultural Society* v. *Mayor &c. of Essendon* (4); *Port of London Authority* v. *Assessment Committee of Orsett Union* (5), and *London Playing Fields Society* v. *Essex South-West Assessment Committee* (6). The grantee of land is tenant in fee simple (*Sculcoates Union* v. *Dock Co. at*

(1) (1864) 11 H.L.C. 443, at pp. 503 *et seqq.*: 11 E.R. 1405, at p. 1428.
(2) (1911) 12 C.L.R. 653.
(3) (1905) 3 C.L.R. 298.
(4) (1892) 18 V.L.R. 92; 13 A.L.T. 242.
(5) (1920) A.C. 273.
(6) (1930) 46 T.L.R. 631.

Kingston-upon-Hull (1)). The trustees are bare trustees for the Crown (*Municipal Council of Sydney* v. *Royal Agricultural Society of New South Wales* (2)).

Cur. adv. vult.

Dec. 8.

The following written judgments were delivered :—

ISAACS C.J. The question in this case is whether the Club is ratable for two distinct parcels of land, or either of them, and if so, on what basis. All the lands are held by the appellant in trust for the Club, and therefore I shall refer to the Club as tenant of one parcel and as owner of fee simple of the other. The leasehold lands are held under a lease by the proprietors of an estate in fee simple, registered under the *Real Property Act* 1900 (N.S.W.). The lease was made in exercise of the provisions of the *Australian Jockey Club Act* 1873, and is dated 4th February 1920. It was made for the term of twenty-one years from the date thereof at a peppercorn rent, but was granted and accepted subject to the conditions, reservations and provisions in the Crown grant dated 15th June 1863. That Crown grant recited that Sir John Young, Governor of New South Wales, with the advice of the Executive Council, had determined that it was desirable for the public interest that the land granted, which is identified with the land designated in the lease above mentioned, should be dedicated for the purposes of public recreation, and should be granted to trustees mentioned upon six certain trusts. The trusts were in the grantees' discretion to permit and suffer the said land or any part thereof to be used by such persons, clubs or associations at such time and upon such terms and conditions as the grantees or any other trustees of the land thereafter appointed should think fit and proper for any of the purposes described, of which it is only necessary to mention the first two, namely, "as a race-course upon which horse-races may be run under the direction of the Australian Jockey Club or of any other club or association now existing or which hereafter may be founded for the purpose of horse-racing and secondly as a training ground for the purposes of training horses intended to race, and also for the erection of training stables and temporary

(1) (1895) A.C. 136. (2) (1905) 3 C.L.R. 298.

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dwellings for the use of the persons engaged in training race-horses." By the terms of the grant, the maximum period of any lease was seven years from its grant. The Act of 1873 extended the maximum period to twenty-one years, and under the combined provisions of the grant and the Act of 1873, the lease was granted. The Club is the owner for an estate in fee simple of other land, called Warwick Farm Racecourse. It is used solely for the purposes of a race-course, and of training grounds for race-horses, to which the public are admitted on payment. The Commissioner of Land Tax assessed the Club in respect of all the lands mentioned, and the Club, having objected that it is exempt from taxation in respect of all the lands, appealed to this Court. Upon that appeal, my brother *Dixon* stated a case for the opinion of the Full Court. The exemption claimed is rested on various grounds. First, it is said that sub-sec. (*g*) of sec. 13 of the Assessment Act exempts both parcels of land. That sub-section exempts from taxation under the Act, "all land owned by or in trust for any person or society and used or occupied by that person or society solely as a site for . . . (7) a public garden, public recreation ground, or public reserve." It was said that each of those race-courses is solely used as a "public recreation ground." That cannot be maintained, and therefore neither race-course is exempted by the provision quoted. As to the leased property, there is the further answer that it is not used or occupied by the owner of the land at all. The next ground of objection relied on was that the leased land fell within sec. 29 of the Act, because, as it was contended, the Club is "the owner of a leasehold estate under the laws of a State . . . relating to the alienation or occupation of Crown lands." In support of the contention it was urged that the lease, which could only be supported by the Act of 1873, fell within the description of sec. 29 of the Assessment Act, because that was an Act relating to the alienation or occupation of Crown lands. The answer is that the Act of 1873 has no resemblance to what is recognized and understood to be an Act relating to the alienation or occupation of Crown lands, and in particular the leased lands were not in 1873 Crown lands. Another ground relied upon for exemption was the decision of this Court in *Clark Tait &*

Co. v. *Federal Commissioner of Land Tax* (1), the relevant passage quoted by Mr. *Lamb* being found at the top of p. 12 in these words: —"Under sec. 44 a power of resumption without compensation is preserved in the case of leases of which this is one. The power was exercisable at certain intervals and in respect of maximum proportions of the total area of the land contained in the lease. These provisions, in our opinion, coupled with the provisions of the lease itself, show that on any relevant 30th June it could not be known what the future annual payments of rent were, nor what was the future duration of a tenant's right to enjoy any specific part of the land or of his right to enjoy any area of land other than a minimum area unidentified except by the fact that it must be contained in the total area originally granted." Mr. *Lamb* pressed this passage as sufficient to show that if the leased land were said by the Crown to come under the provisions of sec. 27, the decision in *Clark Tait & Co.'s Case* was a sufficient answer. Personally I cannot see any distinction in law between that case and the present in respect of the future duration of the Club's right to enjoy any part of the land leased to it. In *Clark Tait & Co.'s Case* the Crown's reserved power of resumption was contained in sec. 44 of the Act. In the present case, the Crown's power of resumption is contained in the original grant made under an Act of Parliament, and therefore having statutory force behind it. It is also contained in sec. 25 of the *Crown Lands Consolidation Act* 1913 (N.S.W.), which provides that any dedication of Crown lands made before or after the passing of the Act, may be revoked by the Minister if he is of opinion that it is expedient in the public interest to resume the land. There is a somewhat lengthy process provided, but revocation results in the lands becoming Crown lands again. In each case an alienation took place by the Crown, and in each case the law enabled the Crown to resume, and I cannot deny the force of the argument for the taxpayer founded on the passage quoted. But I think, in the circumstances, I have a right to reconsider the question. The present Court is as full a Bench as that which decided *Clark Tait & Co.'s Case*, and I think that although the Legislature in its

(1) (1929) 43 C.L.R. 1.

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recent Act, No. 1 of 1930, did not expressly extend its amendment to sec. 27, that amending Act sufficiently indicates what Parliament means by unexpired period of a lease liable to resumption by the Crown. In other words, I cannot think it means one thing in sec. 27 and another thing in sec. 28. I therefore reject the argument for exemption based on the passage quoted, and hold that unless and until the discretion of the Crown is exercised to resume the land or portion of it, its grant in fee simple stands unabridged, and so does the lease by the grantees. The leased land, in my opinion, falls under sec. 27 of the Assessment Act, and is taxable accordingly. That is to say, the Club is deemed "to be the owner of land of an unimproved value equal to the unimproved value of his estate." As regards the unimproved value, it was urged on behalf of the Crown that, in the new definition of unimproved value contained in Act No. 8 of 1930, the words "the fee simple of the land" meant the fee simple without any conditions or restrictions; and in support of this, Mr. *Jordan* quoted a judgment of *Pike* J. in *Armidale Racecourse Trustees* v. *Armidale Municipal Council* (1). I cannot agree with that decision. It is, in my opinion, contrary, not only to justice, but to law, and is, I think, inconsistent with *Corrie* v. *MacDermott* (2).

The words "fee simple" merely denote the quantity of estate. I refer to what I said in the case of *The Commonwealth* v. *New South Wales* (3) as to the nature of an estate in fee simple. The references there given show there is no reason whatever for disregarding restrictions or conditions when valuing the fee simple.

My answers to the questions of law in the case stated are as follow:—(1) All the parcels are liable to taxation. (2) (*a*) The unexpired period of the leased land was the period extending to 4th February 1941. (2) (*b*) The lease is within the operation of sec. 27 of the Act. (3) The fee simple to be valued is the estate subject to conditions and restrictions in the grant. (4) This was not argued.

RICH J. I have had the advantage of reading the judgment of my brother *Dixon*, and agree with it. I find it unnecessary to add

(1) (1923) 6 L.G.R. (N.S.W.) 151.
(2) (1914) A.C. 1056; 17 C.L.R. 223; 18 C.L.R. 511.
(3) (1923) 33 C.L.R. 1, at p. 42.

anything save upon the question upon which there is a difference in the Court as to the basis upon which the value of the land should be assessed within the meaning of sec. 27, sub-sec. 4 (*b*), of the *Land Tax Assessment Act*. I have long been deeply imbued with the hypothetical character of the valuation required for the purposes of the taxation of unimproved land values. In *Campbell* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) I said (1): "I think a great many difficulties would disappear from these cases if the Legislature were to amend the definition of 'unimproved value' by putting it on a practical instead of a hypothetical basis." The attention which was given to the subject of the valuation of leasehold interests in *Jowett* v. *Federal Commissioner of Taxation* (2) and *Clark Tait & Co.* v. *Federal Commissioner of Land Tax* (3) left my mind with the impression that the entire basis of valuation of these interests was hypothetical or arbitrary.

I agree with the answers given by my brother *Dixon* to the questions in the case.

STARKE J. This case raises the question whether the Randwick and Warwick Farm Racecourses, controlled by the Australian Jockey Club, are subject to land tax under the Land Tax Acts of the Commonwealth. The Randwick Racecourse is held under a lease dated 4th February 1920 granted pursuant to the *Australian Jockey Club Act* of 1873, but the Warwick Farm Racecourse is owned in fee simple by or on behalf of the Club.

The Club relied upon various grounds of exemption which in my opinion cannot be sustained. Under sec. 13 of the *Land Tax Assessment Act* 1910-1928 the following lands are exempt from taxation: "(*a*) all land owned by a State or . . . other public authority of a State; (*g*) all land owned by or in trust for any person or society and used or occupied by that person or society solely as a site for . . . (3) a building owned and occupied by a society, club or association, not carried on for pecuniary profit; (7) a . . . public recreation ground." Sec. 29 provides that

(1) (1915) 20 C.L.R. 49, at p. 53. (2) (1926) 38 C.L.R. 325.
(3) (1929) 43 C.L.R. 1.

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Starke J.

"the owner of a leasehold estate under the laws of a State . . . relating to the alienation or occupation of Crown lands . . . shall not be liable to assessment or taxation in respect of the estate." Randwick Racecourse was granted to trustees, pursuant to the *Crown Lands Alienation Act of* 1861, for the purposes of a race-course, training ground, &c., and for any other public amusement or purpose. It is not, therefore, "owned by a State or . . . other public authority of a State," nor is it held by trustees for any State purposes, but simply for the purposes of a race-course, or other amusements. Warwick Farm Racecourse, being a freehold owned by the Club, is not, of course, owned by a State. The buildings in respect of which the exemption is claimed are all used in connection with the respective race-courses, and are within the race-course enclosures. They are not owned or occupied separately from the race-courses. And the race-courses are not used solely as a site for the buildings. Consequently, the case falls outside the exemption allowed by sec. 13 (*g*) (3). Randwick Racecourse does not, I think, fall within the description "public recreation ground" in sec. 13 (*g*) (7), and certainly Warwick Farm does not. The Randwick course is, by the *Australian Jockey Club Act* 1873, sec. 10, to be maintained and used as a public race-course or for the purposes in the deed of grant mentioned, and subject to the provisions of the Act and by-laws made thereunder. And sec. 12 enables the committee of the Club to make by-laws regulating all matters concerning the land, and the admission and expulsion therefrom of members of the Club or any person, and rates or charges to be paid for admission, and the management of the race-course. By-laws have been made under these powers regulating the use of the race-course and the charges for admission, and providing various privileges for and restrictions upon members and others. A race-course so controlled is not, in my opinion, a public recreation ground. Lastly, the leasehold estate of the Australian Jockey Club in Randwick Racecourse is not held under the laws of a State relating to the alienation or occupation of Crown lands. It is held under a lease granted pursuant to the *Australian Jockey Club Act* of 1873, sec. 3. This brings us to the main question in the case. Under sec. 27 (1) of the *Land Tax Assessment Act*

1910-1928 the owner of a leasehold estate in land under a lease made after the commencement of the Act shall be deemed to be the owner of land of an unimproved value equal to the unimproved value of his estate. Sub-sec. 4 declares that for the purposes of the section "(*a*) the unimproved value of a leasehold estate means the present value of the annual value of the land calculated for the unexpired period of the lease at four and a half per centum . . . on the prescribed tables for the calculation of values; (*b*) the annual value of land means four and a half per centum of the unimproved value of the land." Under sec. 3 "unimproved value," in relation to land, means the capital sum which the fee simple of the land might be expected to realize if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that the improvements (if any) thereon or appertaining thereto and made or acquired by the owner or his predecessor in title had not been made. The difficulty is in ascertaining the basis of the valuation: should the fee simple value of the land be ascertained without any regard to restrictions or conditions affecting the use of the land in the hands of the owner, that is, upon a hypothetical or conjectural basis; or should that value be ascertained having regard to all restrictions and conditions affecting its use in the hands of the owner? The Act itself does not afford much guide to the solution of the problem. Land tax is levied upon the unimproved value of all lands within the Commonwealth which are owned by taxpayers (sec. 10). And the tax is payable by the owner of land upon the taxable value of all land owned by him and not exempt, and it is charged on land as owned at midnight on 30th June preceding the financial year for which the tax is levied (secs. 11 and 12). But it is not always the owner in fee simple that is taxed, for "owner" includes, *inter alia*, every person who jointly or severally, whether at law or in equity, is entitled to the land for an estate of freehold in possession (sec. 3, definition "owner"). We were referred to some cases in New South Wales and in New Zealand favouring the view that the unimproved value of the land should be ascertained without regard to any restriction or condition affecting its use in the hands of

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the owner. But in *Toohey's Ltd.* v. *Valuer-General* (1) the Judicial Committee said, in relation to the provisions of the *Valuation of Land Act* 1916 of New South Wales, which are in substantially the same words as the Federal Act:—"What the Act requires is really quite simple. Here is a plot of land; assume there is nothing on it in the way of improvement; what would it fetch in the market? . . . It has again and again been pointed out what the value of land on compulsory acquisition is, *and the principle here is exactly the same.* . . . The value to the owner consists of all the advantages which the land possesses, present or prospective." And it is equally clear on the compulsory acquisition of land that if the owner holds the property subject to restriction then it is a necessary point of inquiry how far those restrictions affect the value (*Corrie* v. *MacDermott* (2)). It would be strangely unjust if a taxpayer were required to pay a land tax on the value land would fetch in the market, with all its potentialities and free from all the restrictions, although in his hands, owing to restrictions upon its use, the land had little or no value, and might even "be struck with sterility"—to use an expressive phrase of *Bowen* L.J. Only the clearest words in an Act of Parliament, in my opinion, could justify a construction which would lead to such results. But then it was argued that in the cases covered by sec. 27, the Court is compelled by that section to take the hypothetical value of the fee simple without regard to any restriction upon the use of the land in the hands of the owner. I see no compelling reason for this conclusion. When sec. 27 (4) (*b*) provides that in calculating the unimproved value of a leasehold estate in land, the annual value of land means four and a half per cent of the unimproved value of the land, the words of the section lead us back to the same problem, and it can hardly be that in one case the hypothetical value of the land is taken, and in another the actual value of the land in the hands of the owner. It is true that in some cases land must be valued in which no fee simple has ever been granted. But that occasions no difficulty, to my mind, for if no fee simple has ever been granted, then no restriction exists upon the use of the land. The statute doubtless forces the assumption

(1) (1925) A.C., at pp. 443-444; 25 S.R. (N.S.W.), at p. 77.

(2) (1914) A.C. 1056; 17 C.L.R. 223; 18 C.L.R. 511.

that the land has been granted in fee simple and the statutory direction is to take that piece of land as if it were held in fee simple and value it at the sum which the fee simple might be expected to realize, &c. (see sec. 3). Perhaps I should notice an argument based upon a passage in *Clark Tait & Co.* v. *Federal Commissioner of Land Tax* (1). It was said that the lease to the Australian Jockey Club had no certain duration because of the power of resumption reserved in the Jockey Club's lease. I do not agree, and all I feel called upon to say as to *Clark Tait & Co.'s Case* is that it involved the construction of other documents and is, therefore, of no authority upon the construction of the lease now before us. But I must not be taken as agreeing in the exposition of that case given by my brothers *Rich* and *Dixon*.

In my opinion, the questions stated should be answered in accordance with the opinion of the Chief Justice.

DIXON J. This case stated raises the question whether the Australian Jockey Club is liable to be assessed for Federal land tax in respect of its race-courses at Randwick and at Warwick Farm and, if so, how the taxable value is to be ascertained. According to the agreed statement of facts the Club is carried on for the purposes of horse-racing in accordance with its Act, rules and by-laws, and is not carried on for pecuniary profit. The race-course at Warwick Farm is held by the Club for an estate in fee simple, but it has a leasehold interest in the greater part of the land which it uses at Randwick. This leasehold interest was granted to the Club at a peppercorn rent by the trustees for the time being of the land and is subject to the conditions, reservations and provisoes of the Crown grant to them. The Crown grant was made in 1863 pursuant to sec. 5 of the *Crown Lands Alienation Act* 1861. It contained a recital of the Governor in Council's determination that it was desirable for the public interest that the land should be dedicated for the purposes of public recreation and should be granted to certain persons upon the trusts, with the powers and subject to the conditions thereinafter mentioned. It then expressed a grant of an estate in fee simple to trustees upon trust in their discretion

(1) (1929) 43 C.L.R. 1.

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to permit and suffer the land to be used by such persons, clubs or associations at such times and upon such terms and conditions as the trustees should think fit for purposes which, briefly stated, are: (i.) as a race-course for horse-races run under the direction of the Club or some other Club founded for horse-racing; (ii.) as a training ground for race-horses; (iii.) as a cricket ground; (iv.) as a rifle butts; (v.) for any other public amusement or purpose which the Governor in Council might declare a public amusement or purpose for which the land might be used. A power was conferred upon the trustees to lease to the Club or any other racing club, or club formed for purposes to which the land was devoted, for any term not exceeding seven years. The grant contained a reservation for roads, stone, gravel and timber, and a reservation to the Crown of a right to resume all or any of the land for any public purpose. It also contained a condition that if the land were used for any other purposes than those mentioned, the grant should be void. In 1873 an Act of Parliament, called the *Australian Jockey Club Act* 1873, empowered the trustees to lease to the Club or any other racing club, or club formed for the purposes to which the land was devoted, for any term not exceeding twenty-one years. It authorized the committee of the Club to make by-laws regulating all matters concerning the lands so leased or any other lands vested in the Club, including the rates and charges for admission thereto. The Club has used the land solely as a site for a race-course and as a training ground for race-horses, and the public has been admitted on payment.

The first contention of the Club is that the race-course at Randwick is exempt from taxation by reason of sec. 13 (*g*) (7) of the *Land Tax Assessment Act* 1910-1930, which exempts "all land owned by or in trust for any person or society and used or occupied by that person or society solely as a site for . . . a . . . public recreation ground." This provision looks to the actual use or occupation of the land. The Club must, therefore, maintain that the use or occupation of the land as a site for a race-course and a training ground for race-horses to which the public are admitted upon payment amounts to use or occupation as a site for a public recreation ground. It is not necessary to attempt a definition or

enumeration of the characteristics of a public recreation ground. It is enough to say that, in my opinion, a course where race-meetings are conducted to which admission is obtained by payment cannot be said to be used solely as a site for a public recreation ground. The next contention of the Club was that so much of the land as was occupied by buildings and erections consisting of refreshment rooms, offices, conveniences, totalisator stands, horse stalls and so on was exempt by reason of sec. 13 (*g*) (3), which exempts all land owned by or in trust for any person or society and used or occupied by that person or society solely as a site for a building owned and occupied by a society, club or association not carried on for pecuniary profit. In spite of the agreed statement that the Club is not carried on for pecuniary profit, this claim to exemption cannot succeed. It fails because the buildings do not stand on distinct parcels of land and are not separately occupied. They are built upon the land used as a race-course and form part of its equipment. Their " site " is the race-course and this is not solely used for the buildings owned and occupied by the Club. It follows that none of the land at Randwick or at Warwick Farm in the hands of the Club is exempt under sec. 13 from taxation. In assessing the taxable value of the Club's leasehold interest in the course at Randwick, the Commissioner applied the provisions of sec. 28. He did so upon the supposition that the trustees, as owners of the fee simple, were exempt under sec. 13, so that the case fell within sec. 27 (3), which requires that a lessee shall be assessed as if his lease was made before the commencement of the Act when the owner is exempt under sec. 13. In this the Commissioner was wrong. The trustees are not exempt under sec. 13. The only head under which the trustees, as distinct from the Club, might conceivably seek exemption is par. (*a*) of sec. 13, which exempts all land owned by a State, or by a municipal, local or other public authority of a State. But the suggestion that the public purposes which they serve as trustees of the land make them part of " the use and service of the " State, within the doctrines expounded in *Mersey Docks and Harbour Board Trustees* v. *Cameron* (1); *Coomber* v. *Justices of the County of Berks* (2) is quite misconceived. Nor is

(1) (1864) 11 H.L.C. 443; 11 E.R. 1405. (2) (1883) 9 App. Cas. 61.

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it possible to sustain the position that the trustees are a public authority of a State. It follows that the leasehold interest should be assessed, not under sec. 28, but under sec. 27, if it be taxable. But the Club contends that sec. 29 operates to exclude it from taxation. This section provides that the owner of a leasehold estate under the laws of a State relating to the alienation or occupation of Crown lands shall not be liable to assessment or taxation in respect of the estate. The lease to the Club was granted pursuant to the power conferred upon the trustees by the provisions of the *Australian Jockey Club Act* 1873, and it is said, accordingly, that the trustees did not grant the lease in virtue of their estate but in the exercise of a power to grant leases given by the statute law of the State. The restrictions upon the use of the land arise from the provisions of sec. 5 of the *Crown Lands Alienation Act* of 1861 and the grant made thereunder. It is said, therefore, that the provisions of the *Australian Jockey Club Act* 1873 which relax those restrictions and give a larger power to lease come under the same head of legislation and are part of the laws of the State relating to the alienation or occupation of Crown lands. This argument is answered by the circumstance that when the *Australian Jockey Club Act* 1873 was passed, the land to which it related had ceased to be Crown land. The statute was a special Act relating, *inter alia*, to land already alienated from the Crown, dealing with the powers of the trustees in their capacity of legal owners holding upon a public trust. Sec. 27 requires that the owner of a leasehold estate in land under a lease made, as the Club's lease was made, after the commencement of the Act, should be deemed to be the owner of land of an unimproved value equal to the unimproved value of his estate, and it provides that for this purpose :—(*a*) the unimproved value of a leasehold estate means the present value of the annual value of the land calculated from the unexpired period of the lease at four and a half per centum according to calculations based on the prescribed tables for the calculation of values ; (*b*) the annual value of land means four and a half per centum of the unimproved value of the land. The Club claims that its lease falls outside these provisions, because its lease has no unexpired period. It says that although the lease is expressed as a term of years, yet in

fact it is subject to the conditions of the Crown grant and these include a reservation to the Crown of a right to resume for public purposes at any time so that the actual duration of the lease is uncertain. For this argument a passage in the judgment of *Knox* C.J., *Gavan Duffy* and *Rich* JJ. in *Clark Tait & Co.* v. *Federal Commissioner of Land Tax* (1) is relied upon. The difference between the two cases lies in the character of the interests enjoyed by the taxpayers at the relevant 30th June. In *Clark Tait & Co.'s Case* the duration of the term of the Crown lease was expressed to be subject to the rights, powers, privileges, terms, conditions, exceptions, restrictions, reservations and provisoes in the *Land Acts* of Queensland. One of these conferred upon the Crown, the lessor, a right to take a fourth of the land at regular intervals. Another provided for the assessment of rent from time to time at a rate per acre. The conclusion was not difficult that these provisions combined to create a term of uncertain, although limited, duration depending upon the will of the lessor, and not to grant a term certain defeasible upon a condition. A lease which names a period of time subject to the will of the grantor to interrupt it, may be regarded as doing no more than fixing the maximum duration of the term. But in this case the lessors demised the land for a definite term which they have no power to abridge or affect. The term may be earlier determined by the exercise of the Crown's power of resuming the lessor's estate. But this is an external event independent of the lessor's volition operating as a condition subsequent. The consequences of the contrary conclusion, namely, that the lease has no definite term, is by no means clear. The chairman of the Club is the lessee, and sec. 9 of the *Australian Jockey Club Act* 1873 provides that the property of the Club shall vest in and be held by the chairman and his successors as if they were a corporation sole. Sec. 42A of the *Land Tax Assessment Act* 1910-1930 requires that where land is occupied by a person who is not the owner and there is no lease for a definite term in respect of the occupancy, he shall be deemed to be the lessee for life and shall be assessable as provided in sec. 27. It is not easy to

(1) (1929) 43 C.L.R., at pp. 11-12.

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apply such a provision to the occupancy of a club or of a corporation whether sole or aggregate. But, as I have said, I think the lease has a definite term although liable to be defeated.

It is, therefore, assessable under sec. 27. This means that as a first step in ascertaining the unimproved value of the leasehold estate four and a half per centum must be taken of the unimproved value of the land. "'Unimproved value,' in relation to unimproved land, means the capital sum which the fee simple of the land might be expected to realize . . . assuming that . . . the improvements did not exist" (sec. 3). The Commissioner maintains that when this statement is applied to sec. 27 it means that the value must be determined upon an unimproved basis of a hypothetical estate in fee simple free from encumbrances. The Club, on the other hand, contends that the value must be found on an unimproved basis of the actual fee simple granted by the Crown subject to all the conditions and obligations imposed by the grant. It is said the actual title in fee simple must be taken and the value to the owner under such a title must be ascertained, and such cases as *Hilcoat* v. *Archbishops of Canterbury and York* (1), *Sculcoates Union Case* (2) and *Corrie* v. *MacDermott* (3) are relied upon. There is much to be said for the view that generally the Act means to tax the unimproved value of land ascertained upon the basis of an unencumbered estate in fee simple in possession and to levy the tax upon the owner of the first estate of freehold or other person entitled to receive the rents and profits. (See sec. 3 definition of "owner," secs. 10, 11, 25, 26, 31 and 32.) This view of similar legislation has been adopted by *Pike* J. in the Land and Valuation Court of New South Wales (*Goulston* v. *Valuer-General* (4); *Armidale Racecourse Trustees* v. *Armidale Municipal Council* (5)); and in New Zealand the general references to "land" and "unimproved value" in the *Government Valuation of Land Act* 1896 were taken to refer, not to the actual estate of the owner, but to the full property in the land (see per *Cooper* J. in *In re Hutt Park and Racecourse Board* (6)). But the question in the present case is confined to sec. 27.

(1) (1850) 10 C.B. 327; 138 E.R. 132.
(2) (1895) A.C. 136.
(3) (1913) 17 C.L.R. 223; (1914) A.C. 1056; 18 C.L.R. 511.
(4) (1924) 7 L.G.R. 17, at p. 19.
(5) (1923) 6 L.G.R. 151, at p. 153.
(6) (1907) 27 N.Z.L.R. 246, at p. 251.

That section, like sec. 28, prescribes a method of ascribing a value to the leasehold interest which is arbitrary and artificial. Both sections commence with the unimproved value of the land, i.e., of the fee simple. In the case of sec. 28, land must be valued in which no fee simple has ever been granted, and whatever the words "four and a half per centum of the unimproved value of land" mean in sec. 28 (3) (*a*) they must also mean in sec. 27 (4) (*b*). Moreover, the exclusion of Crown leases from sec. 27 was not expressed until Act No. 29 of 1914, and the exclusion supposes that without it sec. 27 might apply to Crown leases and thus, like sec. 28, require the determination of the value of an estate in fee simple in land not yet alienated from the Crown. If the provision intended the actual fee simple to be taken, it would be logically difficult to avoid the consequence that it should be valued as a reversion expectant upon the lease. For the choice appears to be between taking the actual estate in fee in its actual state of title and adopting a hypothetical estate. Yet it is evident that both sec. 27 and sec. 28 adopt four and a half per centum of the capital value as an arbitrary rent. It would be strange if the amount of the rent actually reserved in the lease might indirectly affect the amount upon which the four and a half per centum is calculated, as it would do if the lease were treated as an encumbrance. The policy suggested by these sections is to determine the value of the leasehold interest by a calculation one term of which is a percentage of the unimproved capital value of a full interest in the land. For these reasons the better view appears to be that sec. 27 (4) (*b*) requires the ascertainment of the unimproved value of a hypothetical fee simple absolute and not the actual fee simple subject to conditions and encumbrances.

In determining this value it was not contended on behalf of the Commissioner that the fact that the land was licensed as a race-course under sec. 51 (1) of the *Gaming and Betting Act* 1912-1927 should enhance the unimproved value, and it was conceded that this licence might be considered "a similar interest" within the meaning of those words in the definition of "value of improvements" in sec. 3 of the *Land Tax Assessment Act* 1910-1930.

The questions in the case stated should be answered :—(1) All of them. (2) (*a*) On 30th June 1927 there was an unexpired period

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of the lease within the meaning of sec. 27 (4) (*a*) consisting of the period from that date until 4th February 1941. (2) (*b*) Within the operation of sec. 27. (3) A fee simple unencumbered by the conditions of the Crown grant and the *Australian Jockey Club Act* 1873 and the lease. (4) To the first part, No; to the second, it does amount to or create "a similar interest."

Questions answered as set out at the end of the judgment of Isaacs C.J. Costs of and occasioned by case stated to be costs in appeal.

Solicitors for the appellant, *Macnamara & Smith.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

REF. at 153 - 78 W.N. 428 : 61 S.R. 667
DIST 50 W.N. 290 : 63 S.R. 340
92 " 904 : 71 " 79

[HIGH COURT OF AUSTRALIA.]

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED AND ANOTHER . . . . . PLAINTIFFS, APPELLANTS;

Foll'd :- 52 (W.S.W.) S.R. 290
69 W.N. 326
Applied. 92. C.L.R. 349.

AND

RUSSELL . . . . . DEFENDANT, RESPONDENT.

Dist. at p. 143.
(1976) 2 N.S.W.L.R. 504.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1931.

MELBOURNE, *Feb.* 16.

SYDNEY, *April* 1.

Gavan Duffy C.J., Starke, Evatt and McTiernan JJ.

Landlord and tenant—Parol demise—Option to purchase—Exercise of option—Parol agreement to purchase—Unenforceable by action—Possession by purchaser—Action to recover land by vendor's successor in title—Whether parol agreement to purchase could be relied upon by purchaser in possession—Instruments Act 1928 (*Vict.*) (*No.* 3706), *sec.* 128.

The plaintiffs' predecessor in title by parol demised certain land to the defendant for a term of three years and by parol gave an option to purchase the land to the defendant, which option the defendant exercised. The