[HIGH COURT OF AUSTRALIA.]

YORK HOUSE PROPRIETARY LIMITED . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1930.

MELBOURNE, *March* 10, 11.

SYDNEY, *March* 31.

Knox C.J., Isaacs and Starke JJ.

Income Tax (Cth.)—Assessment—Deductions—Annual sum necessary to recoup expenditure made by lessee on improvements—Company—Covenant to erect building—Expenditure partly before and partly after incorporation—Recoupment by company after incorporation—Deduction only as to money paid after incorporation—Income Tax Assessment Act 1922-1925 (*No.* 37 *of* 1922—*No.* 28 *of* 1925), *sec.* 23 (1) (*n*)—*Transfer of Land Act—Unregistered lease—Effect in equity—Transfer of Land Act* 1915 (*Vict.*) (*No.* 2740), *sec.* 61.

Contract—Specific performance—Building contract capable of specific performance.

On 30th August 1922 the owners of certain land under the *Transfer of Land Act* (Vict.) executed a lease under seal for ten years to W. on behalf of a company intended thereafter to be registered. By it W. covenanted that he or the company would erect on the land a building in conformity with certain plans which should remain the property of the owners and would expend not less than £80,000 on the building. The lease was never registered under the *Transfer of Land Act.* The company was incorporated on 9th October 1923. On 26th October 1923 an agreement under seal was made between the owners of the land, W. and the company whereby the lease was adopted by the company and W. was discharged from all liability thereunder. A building was erected by a building contractor under a contract dated 1st November 1922 made with the owners of the land to erect a building in accordance with the plans referred to in the covenant in the lease. The building was not completed until after the incorporation of the company. Portion of the money paid for the erection and completion of the building was paid by the said owners before the company was incorporated and was subsequently recouped by the company, and the remainder was paid by the company after its incorporation. The company claimed under sec. 23 (1) (*n*) of the *Income Tax Assessment Act* 1922-1925 a deduction for the year ended 30th June 1925 of a sum computed, in the manner provided by that section, in respect of both the expenditure by the

H. C. OF A. 1930.

YORK HOUSE [PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

owners of the land prior to the incorporation of the company and recouped by it and the expenditure by the company after that date in connection with the erection of the building.

Held, (1) that though the lease, being unregistered under the *Transfer of Land Act*, was ineffective to pass any estate or interest in the land, yet it was specifically enforceable as an agreement for a lease and, as such, fell within the scope of sec. 23 (1) (*n*) of the *Income Tax Assessment Act*, which, however, does not cover the case of tenancies arising by implication of law: *Great West Permanent Loan Co.* v. *Friesen*, (1925) A.C. 208, and *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Boyd*, (1926) 39 C.L.R. 72, applied; and (2) that the company was entitled to a deduction in respect of the money paid by it after its incorporation, but not in respect of the money recouped by it to the owners of the land for moneys paid by them prior to the incorporation of the company.

CASE STATED.

This was a case stated pursuant to sub-sec. 8 of sec. 51A of the *Income Tax Assessment Act* 1922-1929 for the opinion of the High Court by *Knox* C.J. on the hearing of an appeal to the High Court under sec. 51A of that Act by York House Pty. Ltd. against an assessment to income tax, the Company claiming a deduction under sec. 23 (1) (*n*) of the *Income Tax Assessment Act* 1922-1925 in respect of the year of income ending 30th June 1925. It appeared that Marks Bros. purchased certain land in Little Collins Street, Melbourne. On 30th August 1922 an agreement under seal was executed which was expressed to be made between Marks Bros. and E. A. Wilmot on behalf of York House Pty. Ltd., a company intended to be registered under the *Companies Act* 1915 (Vict.). By this instrument Marks Bros. purported to demise and lease the land (which was under the provisions of the *Transfer of Land Act* 1915 (Vict.)) unto Wilmot on behalf of the Company for the term of ten years as from 1st September 1922 at a yearly rental. Wilmot covenanted by this document, for himself, his executors and transferees, and so as to be binding on him or them until the Company should become substituted as lessee and/or legally bound to perform and observe the conditions and provisions in the lease, that (*inter alia*) he or the Company would erect and complete prior to 1st July 1924 a building on such land in conformity with certain plans agreed upon, which building should remain the property of the lessors, and would expend not less than £80,000 on the building.

The terms of such clause are fully set out in the joint judgment of *Knox* C.J. and *Starke* J. hereunder. This instrument was never registered as a lease under the *Transfer of Land Act* 1915. On 9th October 1923 York House Pty. Ltd. was incorporated under the *Companies Act* 1915. On 26th October 1923 an agreement under seal was made between Marks Bros., Wilmot and the Company, indorsed on the back of the lease of 30th August 1922, whereby the lease was adopted by the Company, and it was agreed that it should be binding upon the lessors, Wilmot and the Company, in the same manner and take effect in all respects as if the Company had been in existence at that date and had ratified the lease and that Wilmot should be discharged from all liability thereunder. A building was erected on the land by one Cooper under a contract dated 1st November 1922 which he made with Marks Bros. to erect a building in accordance with the plans referred to in the covenant in the lease. The building was not completed until after the incorporation of York House Pty. Ltd.; and of the total sum of £64,584 6s. 5d. paid to Cooper for the building, £49,046 17s. 11d. was paid by Marks Bros. before the incorporation of the Company and £15,537 8s. 6d. by the Company after its incorporation. There were also separate contracts with other persons to complete the building and render it fit for occupation, some of which were entered into by Marks Bros. before the Company was incorporated and some by the Company. Under these contracts and to the architect, Marks Bros. paid altogether £10,797 4s. 8d. and the Company paid £10,079 6s. 8d. The whole of the above sums of £49,046 17s. 11d. and £10,797 4s. 8d. paid by Marks Bros. before the Company was incorporated towards the cost of erecting the building were recouped to them by the Company after its incorporation. The Company was formed and controlled by Marks Bros. The Commissioner of Taxation assessed the Company on its income for the year ended 30th June 1925 without allowing any deduction under sec. 23 (1) (*n*) of the *Income Tax Assessment Act*. The Company claimed under that section a deduction for that year of a sum computed in the manner provided by such section in respect of both the expenditure by Marks Bros. prior to 30th November 1923, recouped by the Company, and the

H. C. OF A. 1930.

YORK HOUSE PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

expenditure by the Company after that date in connection with the erection of the building.

Ham K.C. (with him *Tait*), for the taxpayer. The claim for the deduction is made under sec. 23 (1) (*n*) as it appeared in 1925 and before the amendment introduced in 1927. The Company is entitled to deduct both the sums paid direct to the contractor and those recouped to Marks Bros. It is entitled to deduct the latter because it recouped Marks Bros. for money expended by them in erecting the building and the former as being money expended by the Company in completing it. In each case the amount falls within the words of sec. 23 (1) (*n*) of the Act as it stood in 1925, as it is expenditure covenanted to be made on improvements on land by a lessee. The section deals with a covenant to expend money in improvements, and the Company had covenanted by the adopting agreement to perform the covenant set out in the agreement between Marks Bros. and Wilmot.

[ISAACS J. referred to *Encyclopædia of Forms and Precedents*, 2nd ed., vol. IV., pp. 104-105.]

The relevant consideration is the covenant to expend money in improvements, and not the fact of expending money thereon. The total amount should be taken as the value of the improvements for which the taxpayer should be credited. To permit a deduction the improvements must be paid for by the lessee, though they need not necessarily be effected by the lessee. In any event the Company is entitled to deduct the sum actually paid by it after 30th November 1923 to the several contractors and architects who did the work of erecting the building.

Sir Edward Mitchell K.C. (with him *Phillips*), for the Commissioner of Taxation.

[KNOX C.J. You may confine your argument to the moneys other than those repaid to Marks Bros.]

The work in question was done for Marks Bros. To come within the section the Company has to show a sum expended by the lessee under a covenant, and, if before there is any covenant at all by the lessee, the owners have contracted to have that work done and the

work is carried out for them under such contract, that is not work done by or for the lessee at all. There must be a liability by the lessee coupled with payment afterwards. The only covenant is one by Wilmot to erect and forthwith carry out the work. That covenant was entire, and was enforceable in its entirety or not at all. The document is not sufficiently stamped as a lease and is not admissible in evidence (*Dent* v. *Moore* (1)). In any event the document not being registered under the *Transfer of Land Act* is not a lease but only an agreement for a lease, and therefore the obligations therein are not covenants. Moreover, it is not of such a nature that the Court would grant specific performance of it, so that the obligations could never become covenants. It is only expenditure covenanted to be made in a lease which is protected. The lease was entered into before the Company came into existence, and the Company purported to adopt the terms of that lease. This involved a lease beginning before the lessee was in existence, which is impossible. Therefore there was no valid lease, and therefore no valid covenant. [Counsel referred to *In re Johannesburg Hotel Co.*; *Ex parte Zoutpansberg Prospecting Co.* (2) and *Gluckstein* v. *Barnes* (3).]

[STARKE J. referred to *Cooper* v. *Robinson* (4).]

Ham K.C., in reply. The Company, in effect, took a lease for the balance of the term, and whether this was expressed to be for a period of ten years from a past date or for a less period of years and months from the date of the agreement is immaterial (*Halsbury's Laws of England*, vol. XVIII., p. 551). If the lease is not technically good as a lease, it is a valid and enforceable agreement for a lease of which the Courts would order specific performance (*Morrisy* v. *Clements* (5)). The doctrine of *Walsh* v. *Lonsdale* (6) applies to land under the *Transfer of Land Act* (*Macky* v. *Café Monico* (7)).

[STARKE J. referred to *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Boyd* (8).]

(1) (1919) 26 C.L.R. 316, at p. 324.
(2) (1891) 1 Ch. 119, at p. 128.
(3) (1900) A.C. 240, at p. 249.
(4) (1842) 10 M. & W. 694; 152 E.R. 651.
(5) (1884) 11 V.L.R. 13, at p. 21; 6 A.L.T. 107, at p. 108.
(6) (1882) 21 Ch. D. 9.
(7) (1905) 25 N.Z.L.R. 689, at p. 707.
(8) (1926) 39 C.L.R. 72, at p. 81.

H. C. OF A. 1930.

YORK HOUSE PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

"Lease" is defined in *Earl of St. Germains* v. *Willan* (1) and *Halsbury*, vol. XVIII., pp. 387, 335, 366. The Court will grant specific performance of a building contract (*Lowther* v. *Heaver* (2)).

[STARKE J. referred to *Swain* v. *Ayres* (3) and *Strong* v. *Stringer* (4).]

Cur. adv. vult.

March 31.

The following written judgments were delivered:—

KNOX C.J. AND STARKE J. This is an appeal against an assessment to income tax for the financial year 1925-1926. Marks Bros. purchased certain land in Little Collins Street, Melbourne, upon which they proceeded to erect a substantial building. On 30th August 1922 an agreement under seal was executed, which was expressed to be made between Marks Bros. and E. A. Wilmot on behalf of York House Pty. Ltd., a company intended to be registered under the *Companies Act* 1915 of Victoria. By this instrument Marks Bros. purported to demise and lease the land (which was under the provisions of the *Transfer of Land Act* 1915 of Victoria) unto Wilmot on behalf of the Company for the term of ten years as from 1st September 1922 at a yearly rental. Wilmot covenanted, by this document, for himself, his executors and transferees, and so as to be binding on him or them until the Company should become substituted as lessee and/or legally bound to perform and observe the conditions and provisions in the lease, *inter alia*, as follows:— "That the lessee or the Company shall at his or its own cost and expense in all things forthwith on the said land erect cover in and prior to the first day of July one thousand nine hundred and twenty-four or such further time as the lessors shall allow for such purpose complete fit for occupation in a substantial and workmanlike manner with the best materials of their several kinds and in conformity in every respect with the plans elevations sections and specifications already agreed to by the parties hereto and under the inspection and to the satisfaction of the architect and surveyor for the time being of the lessors a building for use as shops offices

(1) (1823) 2 B. & C. 216, at p. 220; 107 E.R. 363.
(2) (1888) 41 Ch. D. 248, at p. 264.
(3) (1888) 21 Q.B.D. 289.
(4) (1889) 61 L.T. 470.

warehouse room showrooms and other general business purposes with all usual and proper offices outbuildings walls drains sewers sanitary appliances and appurtenances all of which as and when erected shall be deemed to be and remain the property of the lessors and neither the lessee nor the Company shall be deemed to have any tenant or other right or interest therein other than as lessee under the said lease and shall expend not less than the sum of eighty thousand pounds on such building and erections and necessary outgoings connected with the erection thereof and if required shall produce to the lessors proper vouchers for such expenditure and shall and may for such purpose pull down remove or alter or otherwise deal with all buildings and erections at present on the said land and the lessee or the Company shall in the erection and completion of such building do all acts and things required by and perform the works conformably in all respects with the provisions of the statutes applicable thereto and with the by-laws and regulations of the Council of the City of Melbourne and shall pay and keep the lessors indemnified against all claims for all fees charges fines penalties and other payments whatsoever which during the progress of the works may become payable or be demanded by the said authorities or any of them in respect of the said works or any of them or of anything done under the authority herein contained and shall punctually and from time to time discharge and pay all claims assessments and outgoings now or at any time hereafter chargeable against an owner or occupier by statute municipal law or otherwise in regard to the said land or any buildings thereon and the lessors their agent architect and surveyor shall have the right at all reasonable times to enter upon the said premises to view the state and progress of the said works or any of them to inspect and test the materials and workmanship and for any other reasonable purpose including the constructing repairing or cleansing of any sewers or drains and the lessee or the Company shall before commencing any such works obtain the necessary licences therefor and set up sufficient hoardings and enclosures and perform all the shoring and other works necessary to uphold the adjoining buildings and shall take all necessary steps to comply with the requirements in relation to the work of any statute or local authority and shall pay all fees and charges required for

H. C. OF A. 1930.

YORK HOUSE PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Knox C.J. Starke J.

any such purposes and the lessee or the Company shall not in the course of the execution of any works hereby agreed to be performed cause or allow any nuisance or do or permit anything which shall cause any unnecessary annoyance or disturbance to the occupiers of adjacent premises and shall pay and indemnify the lessors against all claims for damage done in the course of such pulling down or in connection with the works hereby authorized and also all claims and demands with respect to any alleged interference with or disturbance of light air or other rights or easements that any person may lawfully have or make in regard to the said premises and shall execute all works that may in the opinion of the lessors be necessary for the repair and maintenance of the party walls between present buildings comprised in this lease and other adjoining buildings so far as such repair and maintenance ought to be borne by the owner or occupier of the old buildings or of the buildings to be substituted for them."

This instrument was never registered as a lease under the *Transfer of Land Act* 1915, and is ineffective, until registered, to pass any estate or interest in the land (sec. 61). On 9th October 1923 York House Pty. Ltd. was incorporated under the *Companies Act* 1915. On 26th October 1923 an agreement under seal was made between Marks Bros., E. A. Wilmot, and the Company, indorsed on the back of the document or lease of 30th August 1922, whereby the lease was adopted by the Company, and it was agreed that it should be binding upon the lessors, Wilmot, and the Company, in the same manner and take effect in all respects as if the Company had been in existence to date and had ratified the same, and that Wilmot should be discharged from all liability under the lease. This, of course, did not operate as a ratification of the agreement or lease made before the Company's incorporation, but as a new contract to carry into effect the terms of that agreement, or lease. Before 30th November 1923 Marks Bros. had paid to one Cooper the sum of £49,046 17s. 11d. in connection with the erection of the building, and the Company thereafter paid to Cooper a sum of £15,537 8s. 6d. Cooper was paid these sums under a contract made between him and Marks Bros., whereby he had agreed to erect the building in accordance with certain specifications, general conditions and plans.

Under the *Income Tax Assessment Act* 1922-1925 any wastage or depreciation of a lease is not allowed as a deduction (sec. 25 (*i*)), but a taxpayer is allowed the following deduction under sec. 23 (1) (*n*) :— "The annual sum necessary to recoup the expenditure covenanted to be made on improvements on land by a lessee who has no tenant rights in the improvements. The deduction under this paragraph shall be ascertained by dividing the amount (not exceeding the sum specified in the covenant) expended on the improvements by the lessee by the number of years in the unexpired period of the lease at the date the improvements were effected." The taxpayer claims a deduction under this section in respect of the sum of £49,046 17s. 11d. paid by Marks Bros. prior to 30th November 1923 and the sum of £15,537 8s. 6d. paid by the Company after that date. The Commissioner does not rely upon the provisions of sec. 93 of the *Income Tax Assessment Act*, and expressly disclaimed any suggestion that the arrangement with the Company was made for the purpose of defeating, evading or avoiding any duty or liability imposed by the Acts or for any other purpose mentioned in the section. We must therefore treat the arrangement as real and bona fide, and in no wise colourable or unreal. The provisions of sec. 23 (1) (*n*) must therefore be applied to the case. Those provisions allow a deduction to be made (a) of expenditure under a covenant, (b) upon improvements on land, (c) by a lessee, (d) who has no tenant rights in the improvements. No doubt exists in fact that the taxpayer expended £15,537 8s. 6d., under a covenant, on improvements on land, and that the arrangement between the parties excludes any tenant rights in these improvements. But it is contended that the taxpayer was not a lessee of the land, because the agreement pursuant to which it expended the moneys was ineffective, owing to non-registration, to pass any estate or interest in the land. The agreement or lease is not, however, void. Equitable claims and interests in land are recognized by the *Transfer of Land Act* 1915, and unregistered instruments may confer such equitable claims or interests. (See *Great West Permanent Loan Co.* v. *Friesen* (1) ; *National Trustees &c. Co.* v. *Boyd* (2).) "When there is such a state of things that a Court of Equity would compel

(1) (1925) A.C. 208, at p. 223.

(2) (1926) 39 C.L.R., at pp. 81-82.

H. C. OF A. 1930.

YORK HOUSE PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Knox C.J. Starke J.

specific performance of an agreement for a lease by the execution of a lease, both in the Equity and Common Law Divisions the case ought to be treated as if such a lease had been granted and was actually in existence. There would then be the equivalent of a lease, that is to say, the lease of which equity would compel the execution in specific performance of the agreement" (*Swain* v. *Ayres* (1): see *Coatsworth* v. *Johnson* (2); *Strong* v. *Stringer* (3)). A lease and an agreement for a lease are, as *Lindley* L.J. pointed out in *Swain* v. *Ayres*, two different things, and it is quite true that the taxpayer in the present case had no legal interest in the term under the agreement. It certainly went into possession of the land, and paid rent under the agreement, and doubtless at law became a tenant from year to year of the land, upon the terms of the agreement, so far as they were applicable to such a tenancy. (See, in this Court, *Moore* v. *Dimond* (4).) But sec. 23 (1) (*n*) does not, in our opinion, cover the case of tenancies arising by implication of law, and this legal interest in the taxpayer avails it nothing. So the matter resolves itself into the question whether an agreement for a lease is within the scope of sec. 23 (1) (*n*). If the agreement can be specifically enforced, the landlord has the same rights as if a lease had been granted, and the tenant is protected in the same way as if a lease had been granted. There is thus the equivalent of a lease, and the tenant is the lessee in equity (*Walsh* v. *Lonsdale* (5); *Swain* v. *Ayres*). It is not in opposition to ordinary legal parlance to describe such an agreement as a lease, and the person entitled thereunder as a lessee. Nothing in the nature of the Income Tax Acts requires the restriction of the benefits conferred by sec. 23 (1) (*n*) upon taxpayers to legal demises and tenants taking under such demises.

But it was argued that the agreement before us is not such as a Court of Equity would specifically enforce. The argument is difficult to follow, for registration of the agreement or lease is all that is required to make it operative as a demise in point of law. A decree for specific performance of the agreement is not required to give it efficacy or effect as a legal demise. The suggestion, however,

(1) (1888) 21 Q.B.D., at p. 293.
(2) (1886) 55 L.J. Q.B. 220.
(3) (1889) 61 L.T. 470.
(4) *Ante*, 105.
(5) (1882) 21 Ch. D. 9.

is that the agreement is so uncertain that the Court would have been quite unable to watch over, supervise, and enforce the building covenant. The argument is, for the reason given, quite irrelevant, and in any case, we think, untenable. In *Fry* on *Specific Performance*, 6th ed., pp. 47-48, it is said :—" There are . . . exceptional cases of building contracts in respect of which the Court will interfere. . . . But whether the Court will, or will not, interfere to enforce all such contracts when definite, it appears to be settled that it will assume jurisdiction where we have the following three circumstances : first, that the work to be done is defined ; secondly, that the plaintiff has a material interest in its execution, which cannot adequately be compensated by damages ; and thirdly, that the defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done " (*Wolverhampton Corporation* v. *Emmons* (1) ; *Puddephatt* v. *Leith* (2) ; *Kennard* v. *Cory Bros. & Co.* (3)). The work in the present case is, in the main, quite specific and definite : it is to be executed according to plans and detailed specifications and to the satisfaction of the architect and surveyor for the time being under the contract. The difficulty arises in connection with the words "with all usual and proper offices outbuildings walls drains sewers sanitary appliances and appurtenances." Some or all of these additions to the building are not described in the main contract, and were the subject of subsidiary contracts. But, on the proper construction of the agreement, it would be for the architect and surveyor under the contract to determine what was usual and proper in the way of offices and outbuildings, &c., and to watch and supervise their erection. No real difficulty could be apprehended in ascertaining the work to be done, and whether it had been executed or not executed according to the terms of the contract. Consequently the first condition mentioned by *Fry* is fulfilled. And the fulfilment of the other conditions cannot be seriously contested.

The sum of £48,046 17s. 11d. remains for consideration. This sum was not expended by the taxpayer, York House Pty. Ltd., on improvements on the land, or covenanted to be so expended. It

(1) (1901) 1 K.B. 515. (2) (1916) 1 Ch. 200.
(3) (1922) 1 Ch. 265.

H. C. OF A. 1930.

YORK HOUSE PTY. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Knox C.J. Starke J.

was expended by Marks Bros. on improvements on the land, mainly before the existence of the Company; and all the Company did was to recoup them their expenditure

Lastly, it was argued that no agreement for a lease to the Company could operate or be effective from a day which was past and before the incorporation of the Company, as in the present case. But this argument is also untenable. Leases are frequently expressed to commence from a day which is past, and they relate back to such day for the purposes of computation only (*Enys* v. *Donnithorne* (1); *Bird* v. *Baker* (2); *Cooper* v. *Robinson* (3)).

The result is that the taxpayer is entitled to a deduction in respect of the sum of £15,537 8s. 6d., to be computed in accordance with the provisions of sec. 23 (1) (*n*).

ISAACS J. The taxpayer claims a deduction under sec. 23 (1) (*n*) of the *Income Tax Assessment Act* 1922-1925, in respect of the year of income ending 30th June 1925. In respect of all moneys paid up to 30th November 1923, the taxpayer is clearly not entitled to any deduction, for the reason, independently of any other, that the improvements were effected before the taxpayer came into existence and were therefore not effected by it, and they were not paid for by it, nor by Marks Bros. as agent for the taxpayer. The recoupment alleged, really bookkeeping, was on a basis that does not satisfy the requirements of the sub-section. As to moneys actually paid by the taxpayer after 30th November 1923, I have had some doubt whether the taxpayer did at all material times legally fill the character of lessee required by the sub-section. To satisfy the statutory provision, there must first be a covenant by a "lessee" before the improvements are effected; then the lessee must effect them under the covenant in the "lease"; next, the "lessee" must pay for the improvements, and then he is entitled to the "annual sum" obtained by dividing each sum so expended by the number of years in the unexpired period of the "lease" at the date the improvements were effected. The chain of permissible deduction is not complete unless every link is present. The "lease," which

(1) (1761) 2 Burr. 1190; 97 E.R. 782. (2) (1858) 1 E. & E. 12; 120 E.R. 812.
(3) (1842) 10 M. & W. 694; 152 E.R. 651.

carries with it "lessee," must exist at every necessary point. It is not necessary, in my opinion, that the "lease" should be a strictly legal demise: it is satisfied by an agreement of which specific performance would be granted. (See *Coatsworth* v. *Johnson* (1).) The one vital point is whether a Court of Equity would lend its aid to decree specific performance. In this connection two questions present themselves. The first is whether, assuming no other objection, the building lease is such as would attract the jurisdiction. As to this, and not without some hesitation, I am influenced by the reasons stated in *Wolverhampton Corporation* v. *Emmons* (2) to assent to the view that specific performance would be an appropriate remedy. The other question is more general. Was the transaction a real business transaction, which the statutory relief was designed to meet, or was it a mere scheme for escaping liability, while the substantial ownership remained unchanged, a state of affairs with which sec. 93 would effectively cope? But as that section is not relied on, nothing can, on the facts of this case, be based on the second question.

In the result, the agreement for a lease operates as to payments after 30th November 1923, and I agree with the order proposed by my learned brothers, the Chief Justice and *Starke* J.

The taxpayer should be allowed a deduction for the financial year 1925-1926 *of a sum computed in manner provided by sec.* 23 (1) (*n*) *of the Income Tax Assessment Act* 1922-1925 *in respect of the expenditure by it of the sum of* £15,537 8*s.* 6*d. on improvements on the land mentioned in the case stated. Further the Court does not think fit to answer the questions stated in this case. Remit case to a Justice of this Court for further hearing. Reserve costs of case to Justice who hears appeal.*

Solicitors for the appellant, *Blake & Riggall.*

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

H. D. W.

(1) (1886) 55 L.J. Q.B. 220.

(2) (1901) 1 K.B. 515.