[HIGH COURT OF AUSTRALIA.]

HIGHLANDS LIMITED . . . . . APPELLANT;

AGAINST

THE DEPUTY FEDERAL COMMISSIONER OF TAXES FOR SOUTH AUSTRALIA } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1931.

MELBOURNE, *Oct.* 2, 5, 6.

SYDNEY, *Nov.* 30.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Land Tax (Federal)—Assessment—Agreement for sale—Buyer deemed owner on obtaining possession—Agreements for sub-sales by purchaser—Seller deemed owner until possession delivered to purchaser and 15 per cent. of purchase-money paid—Licensee in occupation—Purchaser deemed in possession and liable to tax —Land Tax Assessment Act 1910-1926 (*No.* 22 *of* 1910—*No.* 50 *of* 1926), *sec.* 37.

Sec. 37 of the *Land Tax Assessment Act* 1910-1926 provides: "37 (1) Where, before or after the commencement of this Act, an agreement has been made for the sale of land, whether the agreement has been completed by conveyance or not—(*a*) the buyer shall be deemed to be the owner of the land (though not to the exclusion of the liability of any other person) so soon as he has obtained possession of the land; and (*b*) the seller shall be deemed to remain the owner of the land (though not to the exclusion of the liability of any other person) until possession of the land has been delivered to the purchaser and at least fifteen per centum of the purchase-money has been paid" &c.

The appellant entered into a contract for the purchase of about 150 acres of land in South Australia in February 1925. The appellant subdivided the land and entered into numerous contracts for sale of allotments of the land. The appellant was, on a construction of his contract which the parties acted upon, to be entitled to possession of the land under his contract before 30th June 1925, within the meaning of sec. 37 (1). None of the sub-purchasers were persons to whom possession had been delivered and who had paid at least 15 per cent of their purchase-money. The land in question was at the date of the contract in the occupation of a person who had held as tenant but whose

H. C. OF A. 1931.

HIGHLANDS LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXES (S.A.).

tenancy was held to have been terminated on or before 1st June 1925, and who was held thereafter to have used the land for grazing as licensee and not as occupier.

Held, that the appellant was in fact in possession of the land and was therefore the owner within the meaning of sec. 37 (1) of the *Land Tax Assessment Act* 1910-1926.

Decision of the Supreme Court of South Australia (*Angas Parsons* J.): *Highlands Limited* v. *Deputy Commissioner of Taxation for the State of South Australia*, (1931) S.A.S.R. 291, affirmed.

APPEAL from the Supreme Court of South Australia.

By a contract of sale dated 9th February 1925 the appellant, Highlands Ltd., agreed to purchase from Alfred Charles Branson about 150 acres of land near Adelaide. The contract provided that the purchase-money should be distributed into ten equal instalments payable on 9th March in each year, the first instalment, which included the deposit already paid, to be paid on 9th March 1925; that when one-fifth of the purchase-money was paid, the appellant should be entitled to a transfer, giving a mortgage for the balance of the purchase-money, but the appellant should be at liberty to pay off the whole or any portion of the balance of purchase-money upon a month's notice; that upon payment of certain sums in respect of each allotment the vendor should execute transfers to sub-purchasers of allotments for which a title in township form was obtained; that "the purchaser shall be entitled to enter into possession of the said lands or any part thereof on the ninth day of March 1925 provided he shall have completed his purchase in accordance with the terms and conditions herein contained" (clause 5); and that the vendor should "have the right to graze the said land and to occupy the house erected on the said property during the currency of this agreement but will surrender this right to any sub-purchaser of any one or more allotments or of the smaller house on the said sub-purchaser substantially fencing the land so purchased" (clause 10).

At the time of the contract the land was occupied by one Eitzen, who held of the vendor under an agreement for a lease for one year expiring on 1st June 1925 and who used the land for grazing cattle. The agreement between the vendor and the occupier provided that one month's notice in writing should be given prior to the expiration

of the term on either side to vacate, leave or give up possession of the land and premises, and, in the event of such notice not being given, the tenancy should thenceforward be monthly; and that the landlord should have the right and liberty to survey and peg the land and clear it of boxthorn. The vendor, before selling to the appellant, caused a preliminary survey to be made or commenced in the course of which pegs were put in some portion of the land. This survey was revised and completed by the appellant soon after the agreement of purchase of 9th February 1925. The vendor notified the occupier of the sale, and told him he must be prepared to leave the land when asked. No notice in writing was given to him requiring him to surrender possession on 1st June 1925, but the vendor made an arrangement with him to the effect that, subject to what the purchaser might do or authorize, he should continue to graze his cows upon the land as long as it remained available, and should pay the vendor for this use of the land amounts which were less than the rent formerly reserved. Immediately after the contract was made the appellant caused hoardings to be erected on the land advertising the sale of subdivisional blocks and prospective buyers and others were brought to inspect the land. Seventeen allotments were sold before 9th March 1925, three hundred and forty-seven before 30th June 1925 and five hundred and fifty-one before 30th June 1926. The contracts by which these sales were made provided for payment of a deposit and the balance by monthly instalments extending over about five years; pending completion the purchaser attorned tenant to the appellant; the purchaser became entitled to possession of the land sold on payment of the deposit and on fencing the land; but until he fenced the land he could not erect thereon any sale board. Little or no fencing was erected by the sub-purchasers at any relevant time, and the acts done upon the land by or on behalf of the appellant or persons claiming under it were confined to what was incidental to or arose out of the sale of the land in subdivision. The appellant was assessed to land tax in respect of the land for the financial years 1925-1926 and 1926-1927, and it appealed to the Supreme Court of South Australia.

The appeals came on for hearing before *Angas Parsons* J. and were dismissed. The learned Judge held that the appellant had, before 30th

H. C. OF A. 1931.

HIGHLANDS LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXES (S.A.).

June 1925, obtained possession of the land within the meaning of sec. 37 (1) of the *Land Tax Assessment Act* 1910-1926, and must therefore be deemed to be the owner as on 30th June 1925 and 1926, inasmuch as none of the land had been sold by it in subdivision to purchasers to whom possession thereof had been delivered and by whom at least fifteen per centum of the purchase price had been paid at either of those dates, and inasmuch as in respect of none of the land sold by it in subdivision had the Commissioner exempted it as seller from the operation of the provisions of sec. 37: *Highlands Limited* v. *Deputy Commissioner of Taxation for the State of South Australia* (1).

From that decision the appellant now appealed to the High Court.

Thomson K.C. (with him *Beauchamp*), for the appellant. The judgment appealed from exhibits an oscillation between the notions of a right to possession on the one hand, and actual possession or occupation on the other. The Act is concerned only with the right to present beneficial enjoyment, and is not affected by the parties' acts or physical occupation. The mere fact of a contract being entered into does not pass the estate; equity looks to the payment of the purchase price. In the case of an agreement to sell on instalments it is too wide a statement to make, to say that the equitable estate passes on the formation of that contract. At most a portion of the estate equivalent to the portion of the purchase-money passes (*Shaw* v. *Foster* (2); *Lysaght* v. *Edwards* (3); *Raffety* v. *Schofield* (4); *Cornwall* v. *Henson* (5); *Howard* v. *Miller* (6); *Central Trust and Safe Deposit Co.* v. *Snider* (7); *Wyvill* v. *Bishop of Exeter* (8); *Harford* v. *Purrier* (9); *Allen* v. *Inland Revenue Commissioners* (10); *Wall* v. *Bright* (11); *Rose* v. *Watson* (12); *Hill* v. *Keene* (13); *In re Stucley*; *Stucley* v. *Kekewich* (14); *Manchester Brewery Co.* v. *Coombs* (15)). The beneficial interest or estate will only pass

(1) (1931) S.A.S.R. 291.
(2) (1872) L.R. 5 H.L. 321, at p. 356; 42 L.J. Ch. 49, at p. 66.
(3) (1876) 2 Ch. D. 499, at p. 506.
(4) (1897) 1 Ch. 937.
(5) (1899) 2 Ch. 710.
(6) (1915) A.C. 318.
(7) (1916) 1 A.C. 266, at p. 272.
(8) (1815) 1 Price 292, at p. 295; 145 E.R. 1406, at p. 1408.
(9) (1816) 1 Madd. 532, at p. 538; 56 E.R. 195, at p. 198.
(10) (1914) 1 K.B. 327; (1914) 2 K.B. 327.
(11) (1820) 1 Jac. & W. 494, at p. 500; 37 E.R. 456, at p. 458.
(12) (1864) 10 H.L.C. 672, at p. 683; 11 E.R. 1187, at p. 1192.
(13) (1903) 23 N.Z.L.R. 404, at p. 405.
(14) (1906) 1 Ch. 67.
(15) (1901) 2 Ch. 608, at p. 617.

to the extent of the relief that equity will give by way of a decree for specific performance or of lien or charge. Equity acts *in personam* and in aid of the law, and relief in equity only consists in protecting such interest as under a particular contract the parties may have. This is primarily a matter of the construction of the particular contract. On the construction of this contract the following matters stand out as having been contemplated :— Payment by instalments of one-tenth per annum, the completion of the purchase was in the minds of the parties as something that would happen probably by payment of one-fifth of the purchase-money, plus a discharge of the existing mortgage plus the execution of a new mortgage. Clause 10 of the contract, using the phrase "during the currency" &c., means to include the currency of the mortgage as well, and was necessary to protect Branson's rights *qua* Eitzen once Highland became the legal owner. It was known that Eitzen was in possession under a valid agreement for a lease, and no provision was made for terminating that agreement, and there was no termination of it in fact. The rent subject to reduction continued to be enjoyed by Branson, and it is a fair inference that it was meant to be enjoyed by him until there was a termination in fact by subsequent arrangement (*Lewis* v. *South Wales Railway Co.* (1)). Possession in clause 5 of the contract may mean possession *qua* proprietor (*Tilley* v. *Thomas* (2) ; *Doe d. Tomes* v. *Chamberlaine* (3)). The alternative view is that possession simply means physical possession or occupation. Possession may mean possession of an estate ; i.e., that a person is entitled to possession, or physical occupation, or physical occupation *qua* proprietor. As to the meaning of "obtaining possession" in sec. 37 see *Tilley* v. *Thomas* (4). Sec. 37 does not apply until the purchaser gets physical possession to the exclusion of the seller. The outstanding fact is that Eitzen had possession and nothing occurred to extinguish his possession.

O'Halloran K.C. (with him *Barry*), for the respondent. Sec. 37 is specially enacted to deal with the cases of the sale of land. As to

(1) (1852) 22 L.J. Ch. 209 ; 10 Ha. 113 ; 68 E.R. 861.
(2) (1867) 3 Ch. App. 61, at p. 66.
(3) (1839) 5 M. & W 14 ; 151 E.R. 7.
(4) (1867) 3 Ch. App., at p. 68.

H. C. OF A. 1931.

HIGHLANDS LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXES (S.A.).

the distinction between being entitled to possession and having possession see *Allen's Case* (1). Under sec. 37 the buyer is deemed to be the primary taxpayer. The section deals with physical possession (*Pollock and Wright* on *Possession in the Common Law*, p. 14). Eitzen was content to have his agreement turned into a right of agistment. [Counsel also referred to *International Paper Co.* v. *Spicer* (2); *Ballard* v. *Shutt* (3).]

Thomson K.C., in reply. Entry *ad hoc* in effect constitutes a licence (*In re Scott* (4); *Phillips* v. *Alderton* (5)).

Cur. adv. vult.

Nov, 30

The following written judgments were delivered:—

RICH J. Sec. 37 of the *Land Tax Assessment Act* 1910-1926 has its origin in legislation in New Zealand, which is expounded by *Hosking* J. in *Yule* v. *Commissioner of Taxes* (6). The expression "so soon as he has obtained possession of the land" in sec. 37 (1) (*a*) refers to possession in the character of purchaser. As *Hosking* J. says, at p. 896, when a person is spoken of as being in possession as purchaser it is but a colloquial method of indicating the particular right under which possession is maintained. "To give effect to the object of preventing dummy sales possession ought to be given the wider rather than a narrower meaning which might lead to evasion." The wider meaning results under our legislation in the liability of the buyer accruing as soon as he secures that control of the land which enables him to enjoy its profitable use or its returns. The Revenue is protected against the seller relieving himself at the expense of the buyer by the provision in sec. 37 (1) (*b*) which retains the seller's liability until at least 15 per cent of the purchase-money has been paid. The question whether the buyer had obtained possession before 30th June 1925 or 30th June 1926, as at which dates the land tax had been imposed, is embarrassed by three factors:—The land had been used for grazing, and was acquired for the speculative purpose of subdivision and sale so that the enjoyment

(1) (1914) 2 K.B. 327.
(2) (1906) 4 C.L.R. 739, at p. 762.
(3) (1880) 15 Ch. D. 122.
(4) (1929) S.A.S.R. 250.
(5) (1875) 24 W.R. 8.
(6) (1918) N.Z.L.R. 890, at pp. 894, 895.

of the land after the manner of the vendor was not likely to be assumed in the same form by the purchasers. Next, the contract of sale contained a self-contradictory, or almost self-contradictory, set of provisions upon which the right to possession depended. Lastly, at the date of the contract a tenancy had not expired under which the vendor's tenant held and grazing rights were reserved to the vendor under the contract which he permitted the tenant to go on exercising, but whether as tenant or licensee was left uncertain. The difficulties presented by the presence upon the land on and after 30th June 1925 of the cattle of this tenant at first appeared formidable, but I think a close examination of the evidence shows that the conclusion arrived at by *Angas Parsons* J. was fairly open, namely, that the tenancy was terminated, although informally, on or before 1st June and thereafter the tenant used the land as licensee and not as occupier. The inconsistency disclosed by the provisions of the contract was of a practical rather than a logical character. Although, upon a construction which gives the primary meaning to all the terms of the contract, it was logically possible to complete by a transfer and mortgage back on 9th March 1925, it is quite evident upon a consideration of the whole contract, and the circumstances under which it was made and the subject matter with which it deals, that it was not intended or expected that completion in such a sense should take place within so short a time as four weeks from the making of the contract. Whatever may be the explanation of the statement that the purchaser shall be entitled to enter into possession on 9th March 1925 provided he shall have completed his purchase in accordance with the terms and conditions contained in the contract, the difficulty which it created was one which the parties could resolve for themselves by delivering and accepting possession in intended performance of the stipulation. In point of fact, the purchasers did quite a number of things upon the land which, although of ambiguous import, were capable of being construed as acts of possession. The correspondence between the parties on or before 10th March 1925 makes it abundantly clear that the purchasers conceived they were being put into possession as on 9th March 1925. The vendor gave evidence that he thought they were entitled

H. C. OF A. 1931.

HIGHLANDS LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXES (S.A.).

Rich J.

to possession from that date. They continued to have such enjoyment under the contract as the land was capable of affording. I see no reason to doubt that they were allowed *de facto* control by the vendor, and intended to exercise it; and this appears to me to amount to obtaining possession within the meaning of sec. 37. I have had an opportunity of reading the judgment of my brother *Dixon* and, in view of the very full statement of the facts which it contains, I refrain from an otiose restatement of these facts by way of anticipation.

In my opinion the appeal should be dismissed with costs.

STARKE J. The appellant was assessed to Federal land tax for the years 1925-1926, 1926-1927, and these assessments were upheld on appeal to the Supreme Court of South Australia, with a slight variation as to the year 1925-1926. An appeal has now been brought to this Court.

On 9th February 1925 the appellant entered into an agreement with one Branson for the purchase of some 150 acres of land. The terms of the purchase, so far as material, were that the appellant should pay a deposit of £500 and the balance in yearly instalments, the last of such payments to be made in March 1932; that it should be entitled to enter into possession of the land or any part thereof on 9th March 1925, provided it should have completed the purchase in accordance with the terms and conditions in the contract contained; that it should be entitled to a transfer of the land upon payment of one-fifth of the total purchase-money and the execution of a mortgage for the balance of the purchase-money remaining unpaid; that the vendor would at the request of the purchaser execute a transfer to any person or persons of any one or more allotments comprised in the survey plan of the land, upon certain terms; that the purchaser should have the right to complete the survey then being carried out or proceed with a further survey; that the vendor should have the right to graze the land and occupy the house erected thereon during the currency of the agreement, but would surrender this right to any purchaser of any one or more of the allotments. Under arrangement with the vendor, Branson,

one Eitzen was grazing cattle on the land during the years 1925 to 1929, and for some time houses on the land were occupied by his tenants or licensees.

A long argument was addressed to us to the effect that the appellant was not, apart from the provisions of sec. 37 of the *Land Tax Acts*, an owner of land within the meaning of the Acts. It is unnecessary to consider this argument in detail, for, as was held, and, in my opinion, rightly held, in the Court below, the case falls within the provisions of sec. 37 :—" 37 (1) Where, before or after the commencement of this Act, an agreement has been made for the sale of land, whether the agreement has been completed by conveyance or not—(*a*) the buyer shall be deemed to be the owner of the land (though not to the exclusion of the liability of any other person) so soon as he has obtained possession of the land ; and (*b*) the seller shall be deemed to remain the owner of the land (though not to the exclusion of the liability of any other person) until possession has been delivered to the purchaser and at least fifteen per centum of the purchase-money has been paid : Provided that the Commissioner may exempt the seller from the provisions of this section, if he is satisfied that the agreement for sale has been made in good faith, and not for the purpose of evading the payment of land tax, and that the agreement is still in force ; as to all which matters the decision of the Commissioner shall be final and conclusive." " Possession " here spoken of is a *de facto* possession referable to the agreement for the sale of land, and not the right to possess, or to have legal possession. But, as *Pollock and Wright* point out (*Possession in the Common Law*, p. 30), " it is not possible, as matter of fact, to possess a house . . . or a field in the same manner as we possess the money in our pockets, or the owner of a cart and horse possesses them when he is driving the horse in the cart. There can only be a more or less discontinuous series of acts of dominion. . . . When the object is as a whole incapable of manual control, and the question is merely who has *de facto* possession, all that a claimant can do is to show that he or someone through whom he claims has been dealing with that object as an occupying owner might be expected to deal with it, and that no one else has done so." *Angas Parsons* J., upon a careful review of the evidence, held that on 30th

H. C. OF A. 1931.

HIGHLANDS LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXES (S.A.).

Starke J.

June 1925 the appellant was in possession of all the land except the large house and its curtilage, and that on 30th June 1926 the appellant was in possession of all the land including this house and curtilage. The evidence amply sustains this finding. The salient facts are that the appellant entered on and completed a survey of the land, dividing it into allotments, and that it placed sale advertisements on the land, took purchasers on to the land to inspect it, and, by June 1926, had practically sold all the allotments. Against this, the contract provided (clause 5) that the appellant should be entitled to enter into possession of the land or any part thereof on 9th March 1925, provided it should have completed its purchase in accordance with the terms and conditions contained in the contract. But *Angas Parsons* J. held, and I agree with him, that the proper interpretation of this clause is that the appellant was entitled to possession of the land on 9th March 1925 when one-tenth of the purchase-money was paid. Again, the suggestion based on sec. 37 (1) (*b*) of the Acts that the purchasers from the appellant were the owners of the land at the date of the assessments (*Allen* v. *Commissioners of Inland Revenue* (1)) cannot be supported, for possession had not been delivered to them, and but few had paid fifteen per centum of their purchase-money.

Lastly, it was said that one Eitzen was in possession of the land. Under clause 10 of the contract, the vendor had " the right to graze the land and occupy the house erected on the property during the currency of this agreement, but will surrender this right to any sub-purchaser of any one or more allotments or of the smaller house on the said sub-purchaser substantially fencing the land so purchased." The vendor had an agreement with Eitzen allowing him, for a consideration, to graze his cattle and to use a house upon the land. But upon the sale of the land to the appellant, his rights were withdrawn, though he was allowed, as well as others, to " run their cattle upon the land." *Angas Parsons* J. held, and in my opinion rightly held, on these facts, that the right to graze conferred upon the vendor under clause 10 of the contract and by the vendor upon Eitzen, did not exclude the possession of the appellant. The

(1) (1914) 1 K.B. 327 ; (1914) 2 K.B. 327.

occupation of the house reserved by clause 10 of the contract has been satisfactorily dealt with by the learned Judge, and need not be further discussed.

The appeal should be dismissed.

DIXON J. This is an appeal from a judgment of *Angas Parsons* J. by which, subject to a variation not now in dispute, assessments of the appellant to land tax for the financial years 1925-1926 and 1926-1927 were confirmed, and two appeals, apparently consolidated, were dismissed.

By a contract of sale dated 9th February 1925 the appellant agreed to purchase about 150 acres of land near Adelaide intending to resell it in subdivision. The question in the case is whether as on 30th June 1925 and 1926 respectively the appellant was or must be deemed to be the owner of all or some part of the land for the purpose of the *Land Tax Assessment Act* 1910-1926.

The learned Judge held that the appellant had before 30th June 1925 obtained possession of the land within the meaning of sec. 37 (1) of that Act, and must, therefore, be deemed to be the owner as on 30th June 1925 and 1926, inasmuch as none of the land had been sold by it in subdivision to purchasers to whom possession thereof had been delivered and by whom at least fifteen per centum of the purchase-money had been paid at either of those dates, and inasmuch as in respect of none of the land sold by it in subdivision had the Commissioner exempted it as seller from the operation of the provisions of sec. 37. I agree with him in this conclusion.

The material portion of sec. 37 requires that, where an agreement has been made for the sale of land, the buyer shall be deemed to be the owner of the land so soon as he has obtained possession of the land. This appears to me to mean possession as purchaser obtained in intended execution of the agreement of sale, performance of which may, of course, be affected by agreed variations of its terms and by waiver, including the acceptance of substituted times and modes of performance. The provision is, no doubt, intended to include cases where the vendor has been in possession by himself, and cases where he has been in possession by his tenants. Accordingly,

H. C. OF A. 1931.

HIGHLANDS LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXES (S.A.).

Dixon J.

it includes not only cases in which the buyer obtains vacant possession, but cases in which he is put in receipt of the rents and profits. Further, " by possession is meant possession of that character of which the thing is capable " (per Lord *FitzGerald*, *Lord Advocate and North British Railway Co.* v. *Young* (1)).

In the present case two buildings, dwellings and some sheds stood upon the land, which otherwise was used for grazing cows. The actual occupier held of the vendor under an agreement for a lease for one year expiring on 1st June 1925. The agreement contained a provision that one month's notice in writing should be given prior to the expiration of the term on either side to vacate, leave, or give up possession of the land and premises, and, in the event of such notice not being given, the tenancy should thenceforward be monthly. Another clause provided that the landlords should have the right and liberty to survey and peg the land and clear it of boxthorn. Acting presumably under this provision, the vendor, before selling it to the appellant, caused a preliminary survey to be made or commenced in the course of which pegs were put in some portion of the land. This survey was revised and completed by the appellant soon after the agreement of purchase of 9th February 1925. The vendor at once notified the occupier of the sale and told him he must be prepared to leave the land when asked. No notice in writing was given to him requiring him to surrender possession on 1st June 1925 ; but the vendor made an arrangement with him, the effect of which was that, subject to what the purchaser might do or authorize, he should continue to graze his cows upon the land as long as it remained available, and should pay the vendor for this use of the land amounts much below the rent which had been reserved by the lease. The position of the occupier was discussed, or at least mentioned, between the vendor and the appellant at the time when the contract of sale between them was made, and a clause was introduced into the contract providing that the vendor should " have the right to graze the said land and to occupy the house erected on the said property during the currency of this agreement but will surrender this right to any sub-purchaser of any one or more allotments or of the smaller house on the said sub-purchaser

(1) (1887) 12 App. Cas. 544, at p. 556.

substantially fencing the land so purchased." Immediately after the contract was made the appellant caused hoardings to be erected on the land advertising the sale of subdivisional blocks. Prospective buyers and others were brought to inspect the land, and, at any rate after the Government Town Planner had certified his approval of the plan of subdivision, allotments were sold. Seventeen allotments were sold before 9th March 1925, three hundred and forty-seven before 30th June 1925 and five hundred and fifty-one before 30th June 1926. The contracts by which these sales were made provided for payment of a deposit and the balance by monthly instalments extending over about five years : pending completion the purchaser attorned tenant to the appellant ; the purchaser became entitled to possession of the land sold on payment of the deposit and on fencing the land ; but until he fenced the land he might not erect thereon any sale board. Few or no sub-purchasers did in fact fence at any relevant time, and the acts done upon the land by or on behalf of the appellant or persons claiming under it were confined to what was incidental to or arose out of the sale of the land in subdivision.

The provisions of the contract by which the appellant purchased the land from the vendor, so far as they affect the delivery of possession, remain for consideration. The purchase-money was distributed in ten equal instalments payable on 9th March of each year. The first instalment, which included the deposit already paid, was due on 9th March 1925. When one-fifth of the purchase-money was paid, the appellant became entitled to a transfer, giving a mortgage for the balance of the purchase-money ; but the appellant was at liberty to pay off the whole or any portion of the balance of purchase-money upon a month's notice. The vendor was required upon payment of certain sums in respect of each allotment to execute transfers to sub-purchasers of allotments for which a title in township form was obtained. Clause 5 was as follows : " The purchaser shall be entitled to enter into possession of the said lands or any part thereof on the ninth day of March 1925 provided he shall have completed his purchase in accordance with the terms and conditions herein contained." If the expression " complete the purchase " has its usual meaning, it would be impossible for the completion to

H. C. OF A. 1931.

HIGHLANDS LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXES (S.A.).

Dixon J.

take place on or before 9th March 1925 consistently with the provisions of the contract, unless the appellant, in the exercise of its option to pay off the purchase-money at any time, gave notice of its intention to do so within a week of signing the contract. The expression may be used in other senses (see the observations of *Cussen* J. in *Myers* v. *Witham* (1)), and *Angas Parsons* J. rejected the contention that it meant payment of all the instalments or of one-fifth of the purchase-money and securing the balance by a mortgage over the land. There can be no doubt that a sensible operation cannot be given to all the provisions of the contract if the expression receives this meaning. But the question whether the vendor would or would not give, and the appellant as purchaser would or would not, take possession on 9th March 1925 was a matter which they necessarily had to determine for themselves at that time. If they conceived that the contract meant that possession should be given on that date and respectively intended to relinquish and to assume possession accordingly, it appears to follow that the appellant obtained possession as purchaser in execution of the agreement for sale. Whether the result is reached by treating the conduct of the parties as an aid to the resolution of the ambiguity or difficulty in the terms of the contract, or by considering the vendor as waiving a condition precedent or potential condition precedent expressed in the proviso about "completion," or by regarding the parties as tendering and accepting substituted performance of the stipulations as to possession, would seem to be immaterial. In point of fact the parties did intend respectively to relinquish and assume possession on 9th March 1925. The vendor seems to have believed that was the date for giving possession, at least when the instalment of purchase-money was paid, as it was. A few days before 9th March the appellant confirmed an arrangement with the vendor to allow him the use of the sheds on the land for the period of the contract. The contract expressly reserved the occupation of the larger house. On 10th March 1925 the appellant's agents wrote to the vendor "On taking possession of the . . . property to-day we find that numerous pegs are missing on the 40 acres block." The land was available to the appellant who

(1) (1924) V.L.R. 470; 46 A.L.T. 65.

could *de facto* exercise all the control of which vacant land admits. The cattle of the former occupier grazed there only by licence. The vendor intended to exercise no further control over it and the appellant's agents conceived themselves as taking possession when the vendor supposed that they were relinquishing it. These facts afford ample support to the finding which *Angas Parsons* J. expressed thus: "My conclusion of fact is that on 30th June 1925 the appellant was in possession of all the land except the larger house and its curtilage."

For these reasons the appeal should be dismissed with costs.

EVATT J. On February 9th, 1925, the appellant Company entered into a contract to purchase from one A. C. Branson (acting on behalf of a partnership consisting of himself and his three brothers) about 149 acres of land situate some miles from the city of Adelaide. At the time of the contract Bransons were registered under the *Real Property Act* as proprietors of the land in fee simple. The object of the appellant in purchasing was described as that of "developing" the land. The euphemism was very familiar in Australia at the time. What was done shows that the real purpose was to resell on extended terms and in small lots, the purchaser being required to pay an inconsiderable deposit with his contract. If the purchaser paid a deposit and fenced, he became entitled to possession of the land. But until he did fence, the appellant was entitled to erect hoardings on the land for the purpose of advertising the whole subdivision. The remaining conditions of these contracts of sale from the appellant to members of the public embody stringent conditions as to payments of instalments, as to forfeiture of past payments in the event of default, and as to the absence of appellant's legal responsibility for representations on the part of those who procured the sales. They are usual enough in this kind of business. In all these contracts the appellant described itself as the "owners" of the land sold.

The moment the appellant purchased from Branson, its business activities commenced. By June 30th, 1925, one hundred and twenty-six members of the public had been induced to sign contracts and had, between them, assumed a liability to pay the

H. C. OF A. 1931.

HIGHLANDS LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXES (S.A.).

Evatt J.

appellant a sum exceeding £36,000. By June 30th, 1926, the appellant had increased its list of purchasers to two hundred and sixteen, and a sum exceeding £60,000 then represented the total liability to it under the various contracts. Two hundred and forty-one allotments were sold on or before June 30th, 1925, and, a year later, all of the five hundred and eighty-one allotments had been disposed of except (1) the portions reserved in the appellant's deposited plan for roads, pleasure grounds and a small reserve, and (2) fifteen small allotments.

It appears that one Eitzen had agreed to lease from the Bransons the subject lands for a period of one year from June 1st, 1924. One month's written notice prior to June 1st, 1925, would have terminated Eitzen's rights. But, after Branson sold to the appellant in February, 1925, he told Eitzen he would have to be prepared to get off at a moment's notice. To this condition Eitzen apparently agreed. He continued, however, to graze cattle on the land for a considerable time, paying to Branson something less than the rental originally arranged between them in 1924. Branson in his evidence says, "Highlands Limited told me I could have grazing rights and that was made a condition of the contract. It was arranged between the Adelaide Development Company and me that I should agree to draw rent from Eitzen if I could. I carried out that arrangement as best I could for the next three or four years." This was substantially in accordance with clause 10 of the contract between Branson and the appellant, which reads as follows: "The vendor shall have the right to graze the said lands and to occupy the house erected on the said property during the currency of this agreement but will surrender this right to any sub-purchaser of any one or more allotments or of the smaller house on the said sub-purchaser substantially fencing the land so purchased."

Whilst Eitzen continued his qualified user of the land for grazing purposes, the Adelaide Development Company (the appellant's selling agent) finished the survey of the subdivision originally commenced by Branson, and proceeded to sell the allotments with the results already noted. The appellant completed the agreement of purchase, and on August 18th, 1926, became registered proprietor of the whole of the subject land.

No improvements in the way of building or fencing have been effected by any of the sub-purchasers from the appellant. No sub-purchasers actually entered into possession of their lots, so that the running by Eitzen of his cattle on the land interfered with neither the appellant nor the sub-purchasers.

By sec. 11 of the *Land Tax Assessment Act* 1910-1927, land tax is payable by the "owner" of land upon the taxable value of all the land "owned by him." Sec. 37 deals expressly with the case of an agreement for the sale of land, for the purpose of determining who is to be deemed the statutory "owner" of the land. Sec. 37 (1) (*a*) provides that the buyer shall be deemed to be the owner "so soon as he has obtained possession" of the land. Whether the sale has been completed by conveyance is immaterial. The section makes the land liable to taxation in the buyer's hands so soon as possession is obtained by him from the vendor.

What was the position on June 30th, 1925 ? It has been already described. The appellant was not merely the buyer from Bransons under the contract made in the previous February but had exercised dominion and control of the land, had completed the scheme of subdivision, had endeavoured to cause all of it to be sold, and had had a great deal of it sold. However the actions of Eitzen are regarded, it is clear that, on June 30th, 1925, he occupied the land for a limited purpose only and precariously. The substance of the matter is that Bransons had themselves ceased to be in possession of the land, and had given up such possession to the appellant in order that the latter could carry out its scheme of disposing of the subdivision.

But it has been suggested that sec. 37 should operate so as to prevent the appellant from being treated as the owner of the two hundred and forty-one allotments it resold before June 30th, 1925. This is not so, for the section also provides that, upon an agreement for the sale of land, the seller "shall be deemed to remain" the owner of the land until he delivers possession of it to the purchaser and receives at least 15 per cent of the purchase-money. The sub-purchasers had not, either on June 30th, 1925, or on June 30th, 1926, obtained possession of their blocks.

H. C. OF A. 1931.

HIGHLANDS LTD. v. DEPUTY FEDERAL COMMISSIONER OF TAXES (S.A.).

I am of opinion that the judgment of the learned Judge was correct and the appeal should be dismissed with costs.

McTIERNAN J. I agree.

Appeal dismissed with costs.

Solicitors for the appellant, *Varley, Evan, Thomson & Buttrose.*

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

H. D. W.

[HIGH COURT OF AUSTRALIA.]

ADDISON AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

CAIN AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1932.

SYDNEY, *May* 3.

MELBOURNE, *May* 30.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Licensing Law—Licensed victualler—Security or charge for payment of moneys—Consent of Licensing Court—Protection from unfair and unreasonable terms and conditions—"Lease, licence, goodwill, interest, or other property"—Mortgage of freehold by owner-licensee without consent—Validity—Liquor Acts 1912-1926 (*Q.*) (3 *Geo. V. No.* 29 –17 *Geo. V. No.* 3), *sec.* 69*.

In sec. 69 of the *Liquor Acts* 1912-1926 (Q.) the words "interest, or other property" include a freehold estate. The application of the section is not limited to securities or charges which contain stipulations relating to supplies of liquor or goods.

Decision of the Supreme Court of Queensland (*Webb* J.) reversed.

* The *Liquor Acts* 1912-1926 (Q.) provide, by sec. 69, as follows:—"(1) It shall not be lawful for any licensed victualler . . . to give, or for any person to take, any security or charge for the payment of moneys over the lease, licence, goodwill, interest, or other property of the licensee in or in connection with the licensed premises, without the consent of the Court. As a condition precedent to the giving of such consent, the Court may require to