[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;

AND

ROYAL SYDNEY GOLF CLUB . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 6.

MELBOURNE, *Sept.* 30.

Latham C.J., Rich, Starke and McTiernan JJ.

Land Tax (Cth.)—Exemption—Land owned by golf club—Part used as site for club house—Use of club house—Part of land used for tennis, bowls and squash racquets —"Land used primarily and principally for the purposes of athletic sports or exercises (other than . . . golf)"—Area so used part only of land owned—Statutory triennial periods—Value of land—Discretion of Court—Land Tax Assessment Act 1910-1937 (*No.* 22 *of* 1910—*No.* 5 *of* 1937), *ss.* 13 (*g*) (3), (*h*), 20 (3), 44M (5).

A golf club not carried on for pecuniary profit owned an area of land of approximately one hundred and fifty acres. The land was an integral whole, was treated by the club as one area and was so enclosed. Within this area there was a golf course, tennis courts, bowling greens, squash racquet courts and a club house. The club house was used for purposes of residence and as a social meeting place, and also for the accommodation and convenience of members playing any of the games mentioned. The tennis courts, bowling greens and squash racquet courts were used solely for the purpose of the games mentioned.

Held, (1) by *Latham* C.J., *Rich* and *McTiernan* JJ. (*Starke* J. dissenting), that the land actually used as tennis courts, bowling greens and squash racquet courts was exempted from taxation by s. 13 (*h*) of the *Land Tax Assessment Act* 1910-1937.

(2) by *Rich* and *McTiernan* JJ., *contra* by *Latham* C.J. and *Starke* J., that that part of the total area of land used as a site for the club house was exempted from taxation by s. 13 (*g*) (3) of the Act.

Stephen v. *Federal Commissioner of Land Tax*, (1930) 45 C.L.R. 122, referred to.

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The operation and effect of s. 20 (3) and s. 44M (5) of the *Land Tax Assessment Act* 1910-1937, discussed.

The Court being equally divided, the decision of the Supreme Court of New South Wales (*Herron* J.) was affirmed.

APPEAL from the Supreme Court of New South Wales.

The Royal Sydney Golf Club appealed to the Supreme Court of New South Wales under s. 44K and s. 44M of the *Land Tax Assessment Act* 1910-1937, against an assessment by the Deputy Commissioner of Land Tax in respect of tax levied under the Act on land owned by the club as at 30th June 1938.

The land owned by the club is situate at Rose Bay, near Sydney. The land is irregular in shape. Its total area amounts to approximately one hundred and fifty acres and is contained in five title deeds.

Within the area at the material date were a golf course, twenty-four tennis courts, two bowling greens, squash racquet courts and a residential club house. No games other than tennis and bowls are played on the tennis courts and bowling greens respectively, and the squash racquet courts are used for the playing only of that game.

The bowling greens are in the same title deeds as lands forming part of the golf course. Some of the tennis courts are in the same title deeds as land forming part of the golf course and other tennis courts are in separate title deeds.

Separating the club house from the golf course on the eastern side are steeply terraced rock gardens through which flights of steps lead down to the golf course, together with a lawn. On the northern side of the club house is another lawn, bounded by a grassed bank which leads down to one of the bowling greens. Beyond the bowling greens on this side are further lawns leading down to the tennis courts. On the north-western side of the club house is a drive leading into it from a public road, and lawns exist on each side of the drive; whilst at the rear of the club house is an open space used for the parking and garaging of the cars of members and their guests.

The club house is a large building containing a basement, a ground floor and a first floor, together with two towers in which are situate quarters for the staff and the secretary, who resides on the premises.

On 30th June 1938, the club had 2,801 members, of whom approximately half were women. The club house in June 1938 provided members with an opportunity for many and varied activities. It contained twenty-eight bedrooms. These were used in that year

on 6,200 occasions, but not necessarily by separate individuals, and there were eighteen persons permanently in residence on the club premises.

Provision was made for meals to be served in the club house. In 1938, approximately 80,000 meals were served there. This number included food served upon the verandahs of the club house, at wedding receptions, dances, and various receptions and entertainments organized by members, and indicated a large measure of social activity in the club. Also in the club house were members' locker rooms used in connection with the playing of golf, tennis, bowls and squash racquets, and there were billiard tables available to the members. The club was licensed to sell liquor, and had lounges and smoke rooms, a drawing room and such-like accommodation. Generally speaking, all the members were entitled to enjoy the whole of the facilities provided by the club, both in regard to the use of the club house and the playing of games. Not all the members played any of the games provided; some used the club house as a social rendezvous; others who resided there played none of the games. The greater percentage of the meals (which included any service of food) was for the benefit of those persons who used the club purely for social purposes, tennis, bowls and the like.

No part of the land owned by the club was used for the pecuniary profit of the club or its members.

The whole of the club's land was included in the assessment. The value of the land was shown at £120,000. The year of the assessment was 1938, and was the third year of a triennial period recognized by s. 20 of the Act. The total area was included in the assessment for each year of that period at the value of £120,000. In 1937, based upon the result of an appeal by it to the Land and Valuation Court of New South Wales, the club returned the value of the land at £187,000, and in 1938 at £170,000. The Deputy Commissioner applied s. 20 (3) of the Act and included the value in the assessment for each of those years at £120,000, so that the value would not exceed that at which the total area was included in the first year of the triennial period. He disallowed deductions claimed by the club amounting to the sum of £45,280, being the club's estimate of the value of the land used for the tennis courts, bowling greens and squash racquet courts and a proportion of the value of the land on which the club house is erected. The deductions were claimed under s. 13 of the Act.

The Supreme Court, *Herron* J., held (*a*) that the land occupied as a site for the club house was exempt from taxation under s. 13 (*g*) (3) of the Act, and (*b*) that the land used as tennis courts, bowling greens

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and squash racquet courts was used primarily and principally for the purposes not of the club but of the sport or exercise and was, therefore, exempt under s. 13 (*h*) of the Act. He rejected a submission on behalf of the Commissioner that as the result of the appeal to the Land and Valuation Court the Supreme Court was enabled to increase the value of the land to £170,000 in the third year of the triennial period, so that if the appeal to the latter Court were successful the value of the exempt parcels could be deducted from that sum. He directed that the assessment be varied by the deduction of an amount equivalent to the proportion that the value of the exempt land bore to the value of the whole area, that is, £120,000, such proportion to be calculated on the assessed values as in 1936. The sum of £12,500 was deducted.

From that decision the Commissioner appealed to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

Barwick K.C. (with him *Hooke*), for the appellant. The important and critical word in s. 13 (*g*) of the *Land Tax Assessment Act* 1910-1937 is the word "site." The land owned by the respondent is utilized as one area; there are not any dissociated portions. The site of the club house is not the land immediately beneath it, but is the whole area. The club house is on the golf course; therefore the site of the club house is the golf course. Thus it follows that the land is not used "solely as a site" as required by s. 13 (*g*) (*Stephen* v. *Federal Commissioner of Land Tax* (1)). The expression "all land owned" in that sub-section should be read as meaning "all parcels of land owned": see s. 11 (3). The land used for the purpose of tennis, squash racquets and bowls is not in separate parcels; it is part of the whole area. Either the exemption applies to the whole area or it does not apply to any part of it. Having regard, therefore, to the provisions of s. 13 (*h*), it is obvious that the exemption conferred by that sub-section does not apply. Section 20 (3) of the Act must be read as subject to s. 44L (4) and s. 44M (5). Upon the allowing of the appeal a new assessable area was created, that is, the residue after deducting the exempt land.

Weston K.C. (with him *K. A. Ferguson*), for the respondent. An inquiry under s. 13 of the Act is a preliminary inquiry which is entered upon and concluded before consideration is given to parcels of land. Upon such an inquiry s. 11 is totally inapplicable, because that section relates exclusively to parcels of taxable land; it does

(1) (1930) 45 C.L.R. 122, at p. 141.

not in any respect refer to exempt land. As shown in *Stephen* v. *Federal Commissioner of Land Tax* (1), the test under s. 13 is a question of fact. That case was decided in the light of its own facts; therefore it is distinguishable from this case. The decision in *Stephen's Case* (1) is not a decision that land upon which buildings actually stand is not automatically within the exemption provided by s. 13 (*g*) (3). The land upon which the club house is erected is used solely as a site for the building. There is not any reference in the sub-section to the purpose or purposes for which the building is used. That purpose or purposes is quite irrelevant. In this particular context "land" means land in the sense of earth, because it deals with land in relation to a building. Except as provided in sub-s. 4 of s. 20 the valuation of the land for the purposes of the Act is unalterable during a triennial period. Sub-section 4 of s. 44L and sub-s. 5 of s. 44M must be read subject to the provisions of sub-s. 3 of s. 20. Sub-section 3 of s. 20 is a statement of policy by the legislature that for each triennial period there is to be a maximum value of the whole or any part of certain land.

Barwick K.C., in reply. The respondent is using one area for a group of associated purposes.

Cur. adv. vult.

Sept. 30.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Supreme Court of New South Wales (*Herron* J.), the effect of which is to exempt from Federal land tax land used by the respondent, the Royal Sydney Golf Club, for a club house and for tennis courts, bowling greens and squash racquet courts at Rose Bay, Sydney.

The *Land Tax Assessment Act* 1910-1937, s. 13, provides: "The following lands shall be exempt from taxation under this Act, namely . . . (*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."

Section 13 (*h*) provides for exemption of "all land owned by, or in trust for, any club or body of persons, and used primarily and principally for the purposes of athletic sports or exercises (other than horse racing or golf) and not used for the pecuniary profit of the members of that club or body."

The Royal Sydney Golf Club owns an area of land of about one hundred and forty-nine acres. Within this area on 30th June 1938,

(1) (1930) 45 C.L.R. 122.

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which is the relevant date for assessment of the tax against which the club appealed, there were a golf course, twenty-four tennis courts, bowling greens, squash racquet courts and a club house. The club house was used for the purposes of residence and as a social meeting-place, and also for the accommodation and convenience of members playing any of the games mentioned. The areas devoted to tennis courts and bowling greens and squash racquet courts were used solely for the purpose of the games mentioned. *Herron* J. held that the land upon which the club house is situated and the land on which the tennis courts, bowling greens and squash racquet courts are situated were exempt from taxation under the provisions which are quoted above.

The land upon which the club house stands is land which is owned by a society, named the Royal Sydney Golf Club, and it is used and occupied by the club as a site for a building owned and occupied by the club. The club is not carried on for pecuniary profit. Accordingly, the land upon which the club house stands would appear to be exempt unless it can be said that that land is not used *solely* as a site for the club house building, or unless there is some provision in the Act, express or implied, which prevents, for the purpose of applying the provisions for exemption, any separate consideration of what may be called the club house site as distinct from the whole area owned by the club.

The land occupied by bowling greens, tennis courts and squash racquet courts is land owned by the club and it is used, not only primarily and principally, but exclusively, for the purposes of the athletic sports or exercises mentioned. It is not used for the pecuniary profit of the members of the club. This land would therefore appear to fall within the precise words of s. 13 (*h*).

Upon this appeal the principal argument for the appellant has been based upon the proposition that the exemptions in question, which depend upon the ownership of land and the user of land, apply only to cases where the whole of what is called a "parcel" of land falls within a provision for exemption. The whole of the one hundred and forty-nine acres is not used solely as a site for the club house, nor is the whole of the one hundred and forty-nine acres used primarily and principally for the purposes of the athletic sports or exercises mentioned. Therefore, it is said, none of the area is exempt under the relevant provisions.

Before considering this general argument upon which the appellant relies, it is convenient to deal with a separate argument that the club house building is used for purposes of golf &c., and that

therefore the piece of ground upon which the club house stands cannot be said to be used solely as a site for a building.

The provisions of s. 13 (*g*) relate to land used or occupied solely as a site for a building owned and occupied by a society, club or association not carried on for pecuniary profit. This provision authorizes exemption only if the land is used or occupied solely as a site for a building. It may truly be said in this case that, though the piece of ground on which the club house stands is used as a site for the building, the building is occupied for the purposes of residence, golf, &c. It is argued that therefore the piece of ground is used not solely as a site for a building, but is used for the purposes of residence, golf, &c. But the exemption relates only to buildings which are "occupied," and all buildings which are "occupied" are used for some purpose or purposes. No land is used solely as a site for an "occupied" building in the sense that the whole user of the land ceases with the erection of the building. (An architectural monument may be a building which is used for no purpose but it would not be an "occupied" building, and the exemption would not apply in such a case.) In my opinion, for the purpose of applying s. 13 (*g*) (3) of the Act, it is not relevant to inquire into the purposes for which the building is used. The conditions of exemption are satisfied if there is land used and occupied solely as a site for a building owned and occupied by a society of the description mentioned in the section, notwithstanding that the building itself is used for a purpose or purposes. If land lost its exemption under this provision by reason of the fact, and by reason only of the fact, that buildings erected on land were used for some purpose, then the provision would have no application in any case whatever. The words of the section do not require such a construction and a court should not, unless forced to do so, adopt a construction which would deprive the provision of all operation. Accordingly, in my opinion the fact that the club house of the respondent club was used for various purposes, residence, social entertainment, golf, tennis, &c., does not deprive the club of the benefit of the exemption contained in s. 13 (*g*) (3).

The more general ground upon which the appellant relies can be stated in the proposition that the exemptions contained in s. 13 apply only to what are called whole "parcels" of land, that is to say, only where the whole of a parcel of land falls within a description contained in one of the various paragraphs of the section. Section 13, it is admitted, contains no reference to parcels of land, but nevertheless it is argued that a parcel of land must be regarded as indivisible when any question of exemption arises, and that either the whole of a parcel or none of the parcel is exempt. Thus, in the

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present case, as the whole of the one hundred and forty-nine acres is not occupied by the club house, it would follow that s. 13 (*g*) (3) has no application, and as the whole of the one hundred and forty-nine acres is not used for tennis courts, &c., s. 13 (*h*) cannot apply to any of the land.

Section 13 (*g*) contains eight provisions for exemption. The result of the appellant's contention is that, though all the parts of an area of land considered separately may come within these provisions, there can be no exemption in such a case because it cannot be said that the whole parcel of land falls within any particular exemption. For example, part of the land might be used for a public recreation ground and the rest of it for a public library. In that case an application of the principle for which the appellant contends would exclude any exemption. No part of the land could be exempt by reason of its user as a public library (s. 13 (*g*) (4)), because the whole of the parcel was not used for that purpose. Similarly no part of the land could be exempt as a public recreation ground (s. 13 (*g*) (7)), because the whole of the land was not used for *that* purpose. Accordingly, although the whole of the land was used for exempt purposes, upon the argument of the appellant none of the land would be exempt.

Section 10 provides that, subject to the Act, land tax shall be levied and paid upon the unimproved value of all lands which are not exempt from taxation under the Act. Thus tax is imposed only upon non-exempt lands. Before any question of imposing tax or of valuing land for that purpose can arise, exemptions must be ascertained. Section 11 contains references to parcels of land, but only in relation to the assessment of the taxable value of land, that is, necessarily, non-exempt land. Section 11 (2) provides that the value of taxable land is to be ascertained parcel by parcel. If I were free to determine the question for myself I should hold that exempt land should first be ascertained, and that the remaining (non-exempt) land should then be valued parcel by parcel, so that the area upon which the club house stands, with its curtilage as determined by *Herron* J., would fall within the words of s. 13 (*g*) (3) and would therefore not be taxable.

But the meaning of this provision has already been considered by the Full Court in *Stephen* v. *Federal Commissioner of Land Tax* (1). In that case the Court interpreted s. 13 (*g*) (3) in relation to buildings on race-courses at Randwick and Warwick Farm. The buildings in question (grandstands, &c.) occupied positions on race-courses. They were owned or held in trust for a racing club which was not carried on for pecuniary profit. It was held (as was obviously

(1) (1930) 45 C.L.R. 122.

the case) that the race-courses were not used solely as a site for the buildings and that therefore the race-courses as a whole were not exempt. But it was further held that the parts of the race-courses upon which the buildings actually stood were not exempt. The grounds of the decision were that the buildings were not owned or occupied separately from the race-courses, that the race-courses were not used solely as a site for the buildings, and that the sites of the buildings were the race-courses and not any particular parts of the race-courses: see per *Starke* J. (1), and per *Dixon* J. (2). This interpretation of the word " site " must be regarded as binding upon the Court. In my opinion *Stephen's Case* (3) has decided that where a building occupies a position on an area of land owned by one owner but does not occupy the whole of that area, then, unless the building is " owned or occupied separately " (by which I understand completely separately) from the rest of the area, no part of the area can be said to be land used or occupied solely as a site for a building within the meaning of s. 13 (*g*) (3) of the Act. Following and applying that decision as I am bound to do I reach the conclusion that the part of the land occupied by the club house is not exempt from taxation.

The case of the tennis courts, bowling greens and squash racquet courts is, in my opinion, distinguishable from that of the club house. The exemption which is relevant here is s. 13 (*h*), which does not contain the word " site." The decision of the court in *Stephen's Case* (3) depends in my opinion upon a particular interpretation there given to the word " site." It does not, except in the reasons for judgment of *Dixon* J., depend upon an opinion that only the whole of a " parcel " of land can be exempt under any of the provisions of s. 13. The case does not decide any question in relation to s. 13 (*h*). The tennis courts, &c., are land owned by a club, used primarily and principally for the purposes of athletic sports or exercises (other than horse racing or golf), and this land is not used for the pecuniary profit of the members of the club. The land falls within the precise words of the exemption, and *Stephen's Case* (3) does not stand in the way of giving effect to what in my opinion is the natural meaning of the words.

A question arises as to the variation to be made in the assessment in consequence of the declaration that part of the land which has been valued by the Commissioner and in respect of which assessments have been issued is exempt from taxation. Section 20 (1) of the Act provides that assessments shall be made in respect of

(1) (1930) 45 C.L.R., at p. 136. (2) (1930) 45 C.L.R., at p. 141.
(3) (1930) 45 C.L.R. 122.

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triennial periods. Section 20 (3) is as follows:—"The value at which any area of land or any interest in an area of land has been included in the assessment of any year of a triennial period shall, subject to the provisions of this Act, not be increased in respect of any subsequent year of that triennial period." In the present case the taxpayer appealed in respect of an assessment of land as owned on 30th June 1938. This assessment was in respect of the third year of a triennial period. The whole land had been included in assessments of the two earlier years of that period at a value of £120,000. In respect of the third year the taxpayer returned the whole of the land at its then value of £170,000, which the learned judge accepted as the true value. *Herron* J. varied the assessment by omitting from it so much of the sum of £120,000 as he regarded as attributable to the exempt land. He said: "The assessment will therefore be varied by a deduction of an amount equivalent to the proportion that the value of the exempt land bears to the total value of taxable land, that is £120,000, such proportion to be calculated on the assessed values, respectively, as in 1936." By this means the learned judge sought to give effect to s. 20 (3) and also to the successful contention of the taxpayer that he had been taxed in respect of land which should have been treated by the Commissioner as exempt *ab initio*. The Commissioner contends that the success of the taxpayer upon the appeal throws open the valuation of the land so that the value may be increased by the court, though not by the Commissioner. The court has power to increase an assessment upon appeal (s. 44M), but it is naturally said that it would be a strange result if the success of a taxpayer in excluding some land from taxation should result in an increase in the amount of tax payable.

Taxpayers must make annual returns (s. 15) and they are annually assessed (s. 18). The taxpayer may object to any assessment and, if his objection is disallowed, may appeal (s. 44K). Thus a taxpayer may appeal in the second or third year of a triennial period, though he did not appeal in respect of the first year. Section 20 (3) provides that "subject to the provisions of this Act" the value at which "any area of land . . . has been included in the assessment of any year of a triennial period shall . . . not be increased in respect of any subsequent year of that triennial period." There are other provisions in the Act, e.g., ss. 20 (4), 21 (1) and (2), which permit increase of value by the Commissioner in certain cases. So also when an assessment is the subject of an appeal in relation to the value of the land assessed the court may increase the assessment under s. 44M (5). But in dealing with the assessments for a second or third year of a triennial period the court is limited by

the provisions of s. 20 (3). The other provisions to which I have referred are plainly enough provisions to which s. 20 (3) is subject, but a difficulty arises where the value of land has increased within a triennial period, or where it is for the first time discovered that the value has increased after the expiry of the first or second year of a triennial period and part of the land is then upon appeal held to be exempt from taxation.

Section 20 (3) refers to "the value at which any area of land . . . has been included" in an assessment. This provision should, in my opinion, be regarded as fixing an upper limit of the value of any "area of land" at the value at which that particular area has been assessed in the first year of a triennial period. In my opinion it is applicable only where a specific and identifiable area of land has been included in an assessment at a particular value. The value of *that* area cannot be increased during the triennial period. But if, for any proper reason, it is necessary to make a valuation of a part only of that land, the section appears to me to have no application. In the present case the final result of the appeal is that certain land is declared to be exempt. Exempt land is never valued for the purposes of the Act—see ss. 10, 11 and 13, to which reference has already been made. It is only taxable land that can be valued and included in an assessment, and therefore s. 20 (3) can apply only to an area of taxable land. The result of the appeal in the present case is to show that the Commissioner valued the wrong area of land at the beginning of the relevant triennial period. He valued the whole of one hundred and forty-nine acres, whereas he should have valued a smaller area.

The value of the smaller area cannot be ascertained by deducting from the original valuation a sum determined by taking the proportion of the area of exempt land to the total area. The description of the land in the present case shows that the value of different portions of the land must vary according to frontages and situation, &c. Further, it is apparent that the exclusion of certain land may, by reason of the effects of severance, depreciate the value of the remaining land in a proportion much greater than that which is represented by the proportion which the excluded land bears to the whole area.

Herron J. did not determine the deductions to be made by simply taking the proportion of the area of exempt to non-exempt land. He directed that the respective values of exempt and taxable land should be ascertained as in 1936, the first year of the relevant triennial period, and that a corresponding deduction should be made from £120,000—the value as assessed for 1936. Thus if the

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value of the exempt land was in 1936 one-tenth of the total value, the deduction would be £12,000. If s. 20 (3) is to be regarded as applying to this case, this method may be justifiable.

But, as I have said, in my opinion s. 20 (3) is not applicable. In my opinion a new valuation should now be made of an area of land which has not hitherto been valued by the Commissioner or included in any assessment at any identifiable value. The appeal relates only to land owned at midnight on 30th June 1938 and the value should in my opinion be ascertained as at that date (ss. 10, 11, 12 and 18).

My brothers *Rich* and *McTiernan* are of opinion that the judgment of the Supreme Court should be affirmed. My brother *Starke* is of opinion that it should be set aside, and I am of opinion that it should be varied in the manner stated. The result is (*Judiciary Act* 1903-1940, s. 23 (2)) that the decision appealed from is affirmed and that the appeal must be dismissed with costs.

RICH J. The controversy in this matter originated in an objection to an assessment made by the Commissioner with respect to the land owned by the Golf Club by which the deductions claimed were disallowed. The objection was treated as an appeal under the provisions of s. 44M of the *Land Tax Assessment Act* 1910-1937 and was heard by *Herron* J. who upheld the appeal and allowed the deductions claimed. There is no dispute about the facts, which are contained in the admissions of the parties and the evidence of Major Coulson, the secretary of the club, made and given at the hearing before the trial judge. The deductions were claimed under s. 13 (*g*) (3) of the Act in question as to the site for the club house, and under s. 13 (*h*) as to the land comprising the tennis courts, bowling greens and squash racquet courts.

On the evidence before him, *Herron* J. found that " the club lands are situated at Rose Bay near Sydney in the State of New South Wales, and the whole of the lands owned by the club are in one area of an irregular shape, and contain approximately one hundred and fifty acres. Within the area at the material date " (30th June 1938) " was a golf links, twenty-four tennis courts, two bowling greens, squash racquet courts, and a residential club house. No games other than tennis and bowls are played on the tennis courts and bowling greens respectively, and the squash racquet courts were used for the playing only of that game. Separating the club house from the golf course on the eastern side were steeply terraced rock gardens through which flights of steps led down to the golf course, together with a lawn. On the northern side of the club house was

another lawn, bounded by a grassed bank which led down to one of the bowling greens. Beyond the bowling greens on this side were further lawns leading down to the tennis courts. On the north-west of the club house was a drive leading into it from a public road, and lawns existed on each side of the drive; whilst at the rear of the club house was an area used for the parking and garaging of the cars of members and their guests." And his Honour also found: "The club house could not be said to be used by the members for any one particular form of recreation or activity, but . . . it had, by 1938, become a meeting place for social purposes between members and their guests, a residence, and a place incidental to the playing of games and of exercises for which facilities were provided."

A preliminary objection was raised that the grounds stated in the taxpayer's objection were not sufficiently stated (s. 44M (3)) (*Molloy* v. *Federal Commissioner of Land Tax* (1)). There was no substance in this contention and it was overruled both by *Herron* J. and by this Court.

There is no dispute that none of the land in question is used for the pecuniary profit of the club or its members. The appellant's contention shortly stated amounts to this, that the land owned by the club must be regarded as one unit and as it serves as a site for the club house and for the purpose of links, tennis and squash racquet courts and bowling greens, it cannot be said to be used or occupied solely as a site, s. 13 (*g*) (3), or primarily or principally for the purposes of athletic sports or exercises (other than horse racing or golf), s. 13 (*h*). During the argument it was summed up in the phrase—the whole must be exempt or none is exempt.

Herron J. has found the facts in favour of the taxpayer, and it remains to be considered whether these facts bring the case within the relevant exemption provisions of the Act, s. 13 (*g*) (3) and s. 13 (*h*). Assessments are made "for the purpose of ascertaining the amount upon which land tax shall be levied" (s. 18). Section 10 imposes land tax upon the unimproved value of all lands which are not exempt from taxation. Section 11 provides that land tax shall be payable by the owner of land upon the taxable value of all lands owned by him not exempt from taxation and then deals with what is the taxable value of all the land owned by any person. For the purposes of assessment only s. 11 (3) deals with the unimproved value of each parcel. No part of exempt land can be included in the taxable land. The inquiry what is exempt land precedes the ascertainment of taxable value and has nothing to do with dealing with separate parcels of the taxable land. Section

(1) (1938) 59 C.L.R. 608.

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13 contains no reference to parcels of land, and if land comes within any paragraph of s. 13 it is exempt from taxation whether it is part of a parcel or not.

With regard to buildings, there is no reference in s. 13 (*g*) (3) to the purpose for which the building is used. The exemption provision relates to the use of the land as a site for the building in question and not to the use to which the building is put. If the use of the building, as distinct from the use of the site, were a relevant consideration, it would be difficult to establish the right to exemption.

In the present case *Herron* J. has found that the site for the club house was such a site as came within the provisions of the subsection. His Honour also found that the land used for tennis courts, bowling greens and squash racquets came within sub-s. *h* of s. 13 and for the reasons already stated it is immaterial that such land may not constitute separate parcels. It was contended, however, that the decision in *Stephen* v. *Federal Commissioner of Land Tax* (1) precluded the interpretation of the exemption provisions which I have suggested. It was said that this case decided that these provisions are not applicable to the case such as the present case where the site of a building is only part of a unit of land owned and occupied as such or where the tennis courts and other playing grounds cannot be disintegrated and regarded as separate portions of the unit. But I consider that, whichever way the exemption sections are interpreted, the decision in that case was based on its particular facts, namely, that there was no site for the buildings other than the whole race-course and it was not used solely as a site for the buildings. The buildings had no significance except as part of the race-course and no building had an independent site. Whereas in the present case the admissions and evidence establish, as *Herron* J. found, that the club house at the relevant date was mainly used for purposes not connected with golf, but as a social rendezvous or club, and that the lands on which the tennis courts, bowling greens and squash racquet courts stand are held primarily and principally for the purpose of these athletic sports. I agree with his Honour's conclusions of law and fact in both instances, so that the parts of the total area of land used as a site for the club house or for the purposes of these three sports are, in my opinion, exempt from taxation under the Act.

A further question arises as to the valuation of the land. The assessment was made in respect of the third year of a triennial period (s. 20). For the first and second years of the period the taxpayer returned the value of all the land at £120,000, and this

(1) (1930) 45 C.L.R. 122.

figure was accepted by the Commissioner. For the third year the taxpayer returned the value of all the land at £170,000, but the Commissioner rightly assessed on a value of £120,000. It was contended on behalf of the Commissioner that as a result of the appeal the court was enabled to increase the value of the land in the third year to £170,000, so that if the appeal was successful the value of the exempt parcels could be deducted from £170,000. In my opinion his Honour was right in adopting £120,000 as the correct figure and ascertaining the amount of the exemption by deducting from £120,000 the proportion of that sum which the value of the exempt parcels bore to all the land on that basis. The Commissioner, in an assessment for a second or third year, must use the value of the first year (s. 20 (3)). The general policy of the Act, therefore, is that the value of land in the first year is not to be increased in the subsequent years of a triennial period, but s. 20 (3) makes this general policy subject to the provisions of the Act. Section 44M, which deals with appeals to this Court or to the Supreme Court of a State, provides (5) that on the hearing of the appeal the court may make such order as it thinks fit, and may reduce, increase or vary the assessment, so that if a taxpayer in a subsequent year appealed against the value placed upon his taxable land by the Commissioner (which could not be greater than that placed upon the land for the first year) it would appear that the court in the exercise of its discretion could increase the value beyond that placed upon the land for the first year, but in view of the general policy of the Act the court would be slow to increase this value in a subsequent year beyond the value placed upon the land for the first year unless it was satisfied that the value for the first year was too low. But it is unnecessary finally to pass upon this point on the present appeal, because the appeal is not against the value of land admitted to be taxable, but against the inclusion of land which is claimed to be exempt. It is not, therefore, a case where the value placed upon the land by the Commissioner for the first year is in issue. And if this could be said to be in issue and that the club by returning the value of the whole of the land for the third year at £170,000 has admitted that the value of the whole of the land for that year was £170,000, this is not evidence that the value of the land in the first year exceeded £120,000. There is, therefore, no evidence before the court of the value of the whole of the land in the first year, except that its value was £120,000. In these circumstances the court in the exercise of its discretion under s. 44M (5) would certainly not be bound to increase the value of the taxable land in the third year beyond what its value should be

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upon the basis of the value placed by the Commissioner on the whole of the land for the first year.

Herron J. therefore adopted the correct procedure when, as in the present case, land or a portion of land becomes exempt by deducting its value from the statutory maximum.

In my opinion the appeal should be dismissed.

STARKE J. The Royal Sydney Golf Club was assessed to land tax pursuant to the *Land Tax Assessment Act* 1910-1937 in respect of certain land vested in a trustee for it and owned at midnight on 30th June 1938: See Act, s. 12. The land had an area of about one hundred and fifty acres and comprised a golf links, residential club house, tennis courts, bowling greens, squash racquet courts and some other amenities. The land was an integral whole, was "treated by the owner as one area" and was so enclosed. The land upon which the golf links, club house, &c., are situated was not separately occupied. It was portion of the whole one hundred and fifty acres of land as distinguished from distinct and separate parcels of land.

The club claims that the site of the club house is exempt from land tax by reason of the provisions of s. 13 (*g*) (3) of the *Land Tax Assessment Act* 1910-1937, which provides for the exemption from land tax of "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."

A similar claim was made in connection with buildings erected on and used in connection with the Randwick and Warwick Farm race-courses (*Stephen* v. *Federal Commissioner of Land Tax* (1)). But this Court rejected the claim in respect of the land the site of the buildings because the buildings were all used in connection with the race-courses and were not owned or occupied separately from the race-courses. Obviously, therefore, the exemption does not extend to cases in which the site of the building is portion of an area of land owned and occupied as one area or an integral whole. The case is a decisive authority against the club's claim to exemption of the site of the club house, which should therefore be rejected. The contrary opinion involves the view that islands of exemption can exist in an area of land owned and occupied as a whole and that the land must be valued with those islands severed from it, which would seriously diminish the value of the taxable land. A suggestion has been made that the buildings on the race-course

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had no significance apart from the race-course whilst the buildings on the land of the Golf Club stand in a different category. One has only to look at the nature of the buildings on the race-courses; cottages for caretakers, grand-stands, luncheon and tea rooms for members and the public, lavatories, offices, workshops, sheds, totalizator buildings, casualty rooms and so forth (See *Stephen* v. *Federal Commissioner of Land Tax* (1)) to deny the suggestion and hold that it cannot be sustained either as a matter of fact or of reason. The suggestion sounds well, but means nothing. It is an indolent way of avoiding the decision in *Stephen's Case* (2) without accepting any responsibility for a proper construction of the Act. And *Stephen's Case* (2), though it may be wrong, was at least the unanimous decision of four members of this Court and should be followed unless the Court is prepared upon consideration to overrule it. Apparently the Court is not prepared to go so far.

The club also claims exemption of the land upon which the tennis courts, bowling greens and squash racquet courts are situated. The claim is based upon the *Land Tax Assessment Act*, s. 13 (*h*), which exempts from land tax " all land owned by, or in trust for, any club or body of persons, and used primarily and principally for the purposes of athletic sports or exercises (other than horse racing or golf) and not used for the pecuniary profit of the members of that club or body."

Consistently with *Stephen's Case* (2) it is difficult to assign a different meaning to the words " all land " in this sub-section from that given to the words " all land " in s. 13 (*g*) (3). They refer in the one case as in the other to an area of land owned and used as one area or as an integral whole. The question is whether that area as a whole is used primarily and principally for the purposes of athletic sports or exercises other than horse racing or golf. And it is plain that the land in this case—the area of one hundred and fifty acres—is used primarily and principally for the purposes of golf and so is excluded from exemption. Indeed, about one hundred and forty acres of the whole area is used as a golf links, four acres for tennis courts, two acres for the club house, and the rest for other purposes.

The appeal should be allowed.

McTiernan J. The order the subject of this appeal was made by the Supreme Court of New South Wales upon an appeal by the respondent under Part V of the *Land Tax Assessment Act* 1910-1937 against an assessment made under that Act for the financial

(1) (1930) 45 C.L.R., at pp. 125, 126. (2) (1930) 45 C.L.R. 122.

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year 1938-1939. In that appeal the Supreme Court, upholding the respondent's objections to the assessment, found that certain lands within the total area included in the assessment were exempt from taxation, one area being exempt under s. 13 (*g*) (3) and another area under s. 13 (*h*). The appeal was decided upon admitted facts and facts proved by evidence.

In the first place it is contended on behalf of the Commissioner that s. 13 operates to exempt land which is deemed to be a separate parcel under s. 11, and as the whole of the area included in the assessment is one such parcel, s. 13 does not operate to exempt any part of it. It is contended on behalf of the respondent that s. 13 applies to any area of land which comes within any of the categories set forth in the section, irrespective of the question whether the area should be deemed to be a separate parcel under s. 11 or not: and it is a question of fact what area of the taxpayer's lands comes within any of those categories. In my opinion the contention of the respondent is the one which is in accordance with the Act. Sections 10 and 11 of the Act apply only to lands of the taxpayer which are not exempt from taxation; that is to say, only to those lands which do not come within any of the descriptions contained in s. 13. This section does not adopt an area of land corresponding with an area deemed to be a separate parcel for the purposes of s. 11 as the unit of land which is exempt from taxation. Any land of the taxpayer that comes within any of the categories set out in the section is exempt from taxation, and the question whether any land comes within any of those categories is a question of fact. Sections 10, 11 and 12 apply only to land that does not come within any of the categories set out in s. 13.

It is unnecessary to repeat the evidence and admissions upon which *Herron* J. determined the appeal.

This material justifies the finding that an area of the land was used primarily and principally for the purposes of tennis, bowling and squash racquets, and comes within s. 13 (*h*).

The only contested issue under s. 13 (*g*) (3) is whether an area within the land included in the assessment was used or occupied solely as a site for the club house. It is not enough to satisfy this description that an area was used or occupied by the club house. The condition of the exemption is that the area was used or occupied solely as a site for that building. But it is not a condition of the exemption that the club house should have been used solely for any particular purpose: the condition of the exemption relates to the use or occupation of the land solely as a site for the building. It is a question of fact whether any area of the land is used or occupied

solely as a site for the club house. To justify a finding in the respondent's favour the evidence and the admitted facts should prove that the land upon which the club house stands is not included in the golf course so that it is merged in the lands used as a site for the golf course, but rather that it is a site which is independent of the golf course and forms the site of the club house. In my opinion, the evidence and admitted facts satisfactorily establish, as *Herron* J. found, that the club house does not stand on the golf course but upon land having the character of a site used or occupied solely for the club house.

The facts of the present case distinguish it from the case of *Stephen* v. *Federal Commissioner of Land Tax* (1). In that case the claim for the exemption of an area from taxation on the ground that it came within s. 13 (*g*) (3) failed because the site of the buildings was the race-course and the buildings formed part of its equipment.

The whole of the respondent's land, including the two areas which come within s. 13 (*g*) (3) and s. 13 (*h*) respectively, was included in the assessment the subject of these proceedings, and the value at which the total area was included in the assessment was £120,000. The year of the assessment was 1938 and the third of a triennial period recognized by the Act. The total area was included in the assessment for each year of the period at the value of £120,000. In 1937 the taxpayer returned the value at £187,000, and in 1938 at £170,000. The Commissioner applied s. 20 (3) of the Act and included the value in the assessment for each of those years at £120,000, so that the value would not exceed that at which the total area was included in the first year of the triennial period. *Herron* J. took the view that in exercising the powers conferred on the court by s. 44M (5) he was fettered by s. 20 (3), and for that reason took the sum of £120,000 as the value of the whole area and varied the assessment by deducting from £120,000 a sum proportionate to the value of the two areas which were held to be exempt from taxation. The sum of £12,500 was deducted. For the Commissioner it was contended that s. 20 (3) did not prevent the court from determining the value of the area not exempt from taxation, by adopting a value greater than £120,000 as that from which to deduct a sum proportionate to the value of the land held to be exempt from taxation. It was contended that the sum of £170,000, which was that at which the respondent returned the value of the whole area for the year 1938, should be taken as the sum from which to deduct a sum proportionate to the value of the exempt land. The respondent had returned the value of the land

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for the years 1937 and 1938 at a sum in excess of £120,000 because in 1937 the unimproved value of the whole area had been determined at £187,000 in a judicial proceeding between the respondent and a party other than the Commissioner. These contentions raise these questions, namely, whether s. 20 (3) does create a restriction on the powers conferred by s. 44M (5); and, secondly, whether the court should in the exercise of its discretion have taken the figure which the taxpayer admitted by its return to be the value of the whole area in 1938 rather than the figure to which s. 20 (3) would have limited the value of the whole area if that had continued to be the area included in the assessment.

As regards the first question it is to be observed that the words "any area of land" in s. 20 (3) would apply more aptly to an area of land not exempt from taxation than to a mixed area consisting of taxable and exempt land, and that the words "subject to the provisions of this Act" are clearly capable of making the sub-section subject to the provisions of s. 44M (5). But I do not think that it is necessary to determine this question finally in this case.

Section 44M (5) vests a wide judicial discretion in the court. In the present case, where the assessment is to be varied in the last year of a triennial period for the reason only that it is necessary to exclude from it land which is not taxable, there is nothing in the Act which requires that the court should raise the value of the land above the value at which it was included in the first and second years of the triennial period.

In my opinion, the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Minter, Simpson & Co.*

J. B.