]HIGH COURT OF AUSTRALIA.]

HOWIE AND ANOTHER . . . . APPELLANTS;
PLAINTIFFS,

AND

NEW SOUTH WALES LAWN TENNIS GROUND LIMITED AND OTHERS . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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1955, SYDNEY, *Nov.* 23-24;

1956, MELBOURNE, *Mar.* 8.

Dixon C.J., McTiernan and Fullagar JJ.

Contract—Tennis ground vested in company—Grant by company of right of special membership for valuable consideration—Right to enter ground and occupy allotted seats—Nature of right—Duration—Whether in perpetuity—Voluntary winding-up—Discontinuance of company's business—Transfer of assets in specie to named association—Clause negativing rights "by way of compensation damages or otherwise" in certain events—Whether equitable rights included—Company disabling itself from performing contract—Implication of terms (if any)—Nature of terms to be implied—Whether assignee association takes assets with burden of special membership rights.

A company which owned a lawn tennis ground issued a circular by which on acceptance by certain persons designated special members it agreed upon payment to it by each of such special members of the sum of £100 to allot him three tickets entitling him (a) to free admittance to the ground, (b) to all the rights of a non-playing member on the ground except the right to use the club-house, and (c) to the occupation of seats allocated by the directors in the reserved section of the grandstand, which it proposed to erect when the required number of applications for special membership were received. Rights of transfer and transmission were attached to each of the tickets allotted. The circular further contained a clause, called shortly "the change of ground" provision which provided: "In the event of the company at any time acquiring a new ground in lieu of the present ground the company will as soon as practicable obtain for its special members then enrolled, rights on the new ground as similar as possible to the rights which they are to enjoy on the present ground in accordance with this circular, but except as herein provided a special member shall have no rights against the company whether by way of compensation damages or otherwise in the event of the company discontinuing its business

through winding-up sale or any other cause whatsoever." The conditions being fulfilled, the grandstand was erected and seats duly allotted. The company went into voluntary liquidation and proposed to transfer its assets (after providing for the satisfaction of certain outstanding debentures and preference shares) to a named association *in specie*. The plaintiffs sought declarations that the company held the ground subject to the rights of the special members above-mentioned and that on transfer to the association those rights would be binding on it. They also sought injunctions to restrain the company and the association from excluding them from the ground and from the allotted seats.

Held: (1) that the right of a special member was at most a right to enter and occupy the seats allotted for the purpose of watching the playing of tennis or such other game as might from time to time be staged on the ground, there being no obligation on the company to stage such games;

(2) that the change of ground provision meant that, so long as the company continued its business of staging sporting spectacles, whether on the ground in question or on some other ground, the rights of special members were preserved, but, if and when it for any reason ceased to carry on that business, such rights were to cease;

(3) that the proviso to the change of ground provision excluded in the circumstances mentioned all rights enforceable by action for damages or in any other way, including by suit for injunction;

(4) that the burden of the agreement could not be laid on the assignee association which had notice of the rights of special members by virtue of the doctrine in *Tulk* v. *Moxhay* (1848) 2 Ph. 774 [41 E.R. 1143], such doctrine being limited to negative covenants, and to covenants made for the benefit of land of the covenantee: *London County Council* v. *Allen* (1914) 3 K.B. 642.

Decision of the Supreme Court of New South Wales (*McLelland* J.), affirmed.

APPEAL from the Supreme Court of New South Wales.

For many years prior to 1920, the control of lawn tennis in New South Wales was undertaken by a body known as the New South Wales Lawn Tennis Association Ltd., which had been incorporated in 1907 or 1908. Besides controlling lawn tennis, the company owned and managed tennis courts at Double Bay. In 1920, an opportunity arose of acquiring for the purposes of lawn tennis an area of land formerly used as an amusement park known as the "White City" which had become vested in the then Minister for Housing, and on 11th October 1920 Mr. M. H. Marsh, as agent for the company, entered into an agreement to purchase the land for £13,350.

For financial reasons, it was decided that two companies should be formed in place of the company then existing, one company being primarily to acquire, manage and maintain tennis courts

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and the other primarily to control the game of lawn tennis in New South Wales. The old company went into liquidation prior to 7th October 1921.

On 26th September 1921 New South Wales Lawn Tennis Ground Ltd. (hereinafter called "the ground company") was incorporated.

The capital of the ground company was £15,000, divided into 5,000 preference shares of one pound each and 10,000 ordinary shares of one pound each. The preference shares were to confer the right to a fixed cumulative dividend at the rate of eight pounds per cent per annum on the capital for the time being paid up thereon respectively and "shall rank both as regards such dividend and as to capital in priority to the ordinary shares but shall not confer any further right or participate in profits or assets". Clause 4 of the Articles of Association provided as follows:—"The shares shall be under the control of the directors, who may allot or otherwise dispose of same to such persons on such terms and conditions and at such times as the directors may think fit and any shares may be issued with such preferential deferred, qualified or special rights, privileges or conditions as the directors may think fit. The ordinary shares shall be available for allotment only to the New South Wales Lawn Tennis Association Limited."

On 6th October 1921 New South Wales Lawn Tennis Association Ltd. (hereinafter called "the association") was incorporated.

On 7th October 1921 an agreement was entered into between the liquidator of the old company and the two new companies for the purpose of governing their relations. The provisions of this agreement need not here be set out.

The courts at Double Bay were disposed of, but considerable sums of money were required for the purposes of converting the land at the White City into tennis courts and in erecting a clubhouse and a grandstand thereon. To meet the costs of purchase and of these moneys, the ground company issued debentures. There was a first issue of £30,000 at eight per cent and a second issue of £14,000 at eight per cent. Preference shares were also allotted. By 31st December 1923 the sum of £21,797 of the £30,000 had been received by the ground company and the sum of £13,593 of the £14,000.

Within two years after its incorporation, the ground company had got into financial difficulties. No payment of dividend on preference shares was ever made and only one payment of interest on the debentures was made, this apparently in 1923 out of capital moneys of the ground company.

In the latter part of 1923, it was considered by the ground company that increased revenue could be obtained if a new grandstand were erected and Mr. M. H. Marsh conceived the idea that finance for such a stand could be raised by offering for £100 three seats in perpetuity in the grandstand to be erected.

The minute of the meeting of the directors of the ground company for 14th September 1923 contains, *inter alia*, the following :—" Mr. Marsh's scheme for building grandstand was discussed, and he was authorised to proceed to try and obtain the necessary number of people to finance his scheme, on the basis of £100 for three seats in perpetuity." A special grandstand committee was constituted and the following is part of the minutes of the meeting of such committee of 21st September 1923 :—" It was decided that to finance the erection of a grandstand a certain number of seats be sold, which were to be held in perpetuity by the buyers, subject to special provisions in the event of any unforeseen circumstances. The drafting of these provisions to be left in the hands of Messrs. Marsh and Allen. It was decided that three seats be sold for £100."

In the minutes of meeting of the grandstand committee for 30th November 1923, the following resolution, amongst others, was adopted :—" 1. That this committee will not proceed to sign any contract for actual erection unless 80% of the purchasers of chairs sign the contract between the seat holder and the company."

A circular and application form in connection with the seats was sent out to persons interested. The circular and application form were, so far as is here material, in the following terms :—

" New South Wales Lawn Tennis Ground Limited
Circular Showing Conditions for Special Membership
of the Company's Ground.
The Grandstand.

The directors of the above-named company have decided to proceed with the enlargement and improvement of the grandstand on the company's ground at Rushcutter's Bay as soon as the required number of formal applications for special membership as hereinafter defined have been received by the company. It is expected that the grandstand will be completed within twelve months from the date of this circular and that it will accommodate about 8,000 spectators. A central section of the grandstand will be provided with special seating accommodation, and will be exclusively reserved for bearers of special membership tickets, Vice-Regal parties, and special guests of the company. Such reserve to be under the control of the directors who may allot the seats as they think fit.

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Privileges of Special Members.

A person who is accepted by the company as a special member will be entitled :—

1. To three tickets entitling each bearer (a) to free admittance to the ground ; (b) to all the rights of a non-playing member on the ground excepting the right to use the club-house; (c) to the occupation of a particular seat in the reserved section of the grandstand to be allocated by the directors.

2. To be recognized by the company, if and when any dispute arises between the special member and a bearer of any of his tickets, as the owner of the said three tickets and all rights appurtenant thereto.

3. To transfer the said tickets or any of them and all rights appurtenant thereto to any person or persons by notice in writing to the company whereupon the transferee shall step into the shoes of the special member as regards such ticket or tickets so transferred.

4. Upon his death to have his legal personal representatives or any person or persons nominated by them in writing recognized and enrolled as special members in his stead with the same rights which he would have possessed if he was alive ; but the company will not recognize any transmission of tickets under this provision unless and until it has received notice in writing from the legal personal representatives of their appointment together with such evidence in support thereof as the directors may from time to time require.

5. To receive from the company a refund of all moneys paid by him on account of his special membership if the grandstand is not completed within 12 months from the date of the acceptance of his application.

Register.

The company will keep a register of all special members and will cause to be entered therein from time to time the names and addresses of all special members, records of transfers or transmission, the number of tickets to which each special member is entitled and such other particulars as may be deemed necessary.

Obligations of Special Membership.

All special members and the bearers of their tickets shall be bound by the regulations and by-laws which the company may make from time to time in regard to the management and control of the ground and the conduct of members in relation to one another and the company's officers and servants.

If any special member or the bearer of a ticket refuses or wilfully neglects to comply with any regulation or by-law of the company or is guilty of any conduct unworthy of a gentleman or lady as the case may be the directors shall have power by the company's officers or servants forthwith to expel him or her from the ground and to exclude him or her therefrom for any length of time, and, in addition, without compensation to terminate the special membership of the special member himself or herself so offending. Provided however that before a special membership is terminated under this provision a special meeting of directors will be held to consider the case and the special member in question will be given one week's notice of such meeting and have the right thereat to give by himself and others such explanation or defence as he thinks fit.

Provision in the Event of Change of Ground.

In the event of the company at any time acquiring a new ground in lieu of the present ground the company will as soon as practicable obtain for its special members then enrolled, rights on the new ground as similar as possible to the rights which they are to enjoy on the present ground in accordance with this circular, but except as herein provided a special member shall have no rights against the company whether by way of compensation damages or otherwise in the event of the company discontinuing its business through winding up sale or any other cause whatsoever.

Applications.

Applications to be enrolled as a special member should be made upon the attached form and should be accompanied by a remittance of the deposit.

Dated the.....day of.....1923.

By Order of the Board of Directors.
(Sgd.) RICHARD T. TARRANT
Secretary.

To the Directors,
New South Wales Lawn Tennis Ground Ltd.,
Rushcutter's Bay, Sydney.
Gentlemen :

I enclose herewith my cheque for £ being the deposit payable on application for special membership of your company's ground at Rushcutter's Bay with the right to tickets.

I request you to enrol me as a special member and to allot me tickets upon and subject to the terms of the company's circular dated the day of 192 .

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I hereby agree to pay the balance of £ in accordance with the terms of the circular and I authorize you to enter my name in the register of special members of your company's ground.

Name in Full.....

(Mr. Mrs. or Miss)

Address.....

Description .....

Date.....

Signature....."

On 10th December 1923 a Mr. R. C. Peoples completed the form of application for seats and sent it to the ground company. His application was accepted. The plaintiff, George Clifton Halliday, is a transferee from Mr. R. C. Peoples. It was agreed on behalf of the defendants that the plaintiff George Clifton Halliday should be treated as entitled to the same rights as Mr. Peoples obtained from the acceptance of his application.

On 20th December 1923, the late Sir Archibald Howie completed a form of application for seats " as for Archibald Howie Junior ", and this application was accepted. It was agreed on behalf of the defendants that the plaintiff Archibald Howie should be treated as entitled to such rights to seats as are conferred by the terms of the circular.

A considerable number of applications for special membership were received and accepted and the construction of an enlarged grandstand was commenced and finally completed. The money to do this was obtained principally, if not wholly, from moneys received from the sale of the rights of special membership. The grandstand in question is known as the southern stand and is adjacent to a playing area comprising four courts and the seats appropriated to special members are situated approximately opposite the centre of the playing area. Each special member was allocated particular seats, each seat being divided from the one adjoining and being individually numbered. A register was kept of special members and of the particular seats allotted to them and they were given metal tickets for each seat bearing the name of the seat upon it and an indorsement as to membership. The seats allotted to the plaintiffs have always been occupied by them or under their respective authorities.

The ground company continued to be in financial difficulties. In 1925, the trustees for the first debenture holders appointed receivers who took over control of the ground company. In 1926, payment of interest under the debentures was deferred by the

debenture holders until 1931. Claims were made against the ground company by the appropriate taxation authorities for land tax and for income tax. The ground company was in its structure a trading company, although the association was not. These claims were from time to time deferred and apparently were never resolved. The association was in 1939 still receiving advice in relation to the liability of the ground company for taxation.

Differences from time to time arose between the ground company and the association in connection with the use of the grounds and analogous matters, and from time to time consideration was given by the executive and by the council of the association to the question of re-organization and, in particular, to the question of ways and means of getting the ground company completely under the control of the association.

In 1925 a proposal was considered whereby the association might purchase the assets of the ground company, whilst in 1926 the council of the association commenced a campaign for the purchase by the association of the debentures.

By 1935 the association had acquired a large number of the debentures, and in 1935, the services of the receivers were dispensed with and a ground management committee was appointed by the association to control the ground company. By 1937 the association had acquired more than seventy-five per cent of the debentures, and was then in a position to control the activities of the ground company.

In 1938 the executive of the association considered ways and means whereby the association might acquire the ground, and in 1940, proposals for re-organization were again considered by the council of the association.

In December 1940 a firm of solicitors prepared a draft agreement between the two companies designed to enable the association to acquire the assets of the ground company. This proposal was considered by the executive of the association but not proceeded with.

In 1946 the council of the association once more considered the question of re-organization and it was resolved to get and to act upon counsel's advice. Counsel was consulted and the president of the association had many conferences. A case for opinion was submitted, a principal question put being how could it best be arranged for the association to acquire the assets of the ground company and to " clean up the involved position " existing between the companies. In May 1948 counsel's opinion was received and a scheme was outlined which was considered to be the best method

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of getting into the association the assets of the ground company. Steps were then taken by the association to implement the scheme.

The first steps indicated in the opinion were for the association to buy out as many as possible of the preference shareholders, to forfeit all debentures upon which arrears were owing and to buy out one of the first debenture holders who appeared likely to cause trouble. At the annual general meeting of the association held on 28th March 1951 it was reported that the position at the moment had almost been brought to a point where finality could be reached, but on account of the proposed railway, matters affecting valuation had temporarily prevented this action being taken.

At the annual general meeting held on 25th March 1952 the chairman reported that plans to carry out the amalgamation of the ground company were almost complete, and on 22nd April 1952 the council of the association resolved " That this council approves of the acquisition of the assets of the N.S.W. Lawn Tennis Ground Ltd."

On 28th May 1952 an agreement was entered into between the ground company and the association whereby it was agreed and declared as follows: " 1. The association hereby releases and abandons its rights to claim and to receive from the company payment of dividends to the date hereof on all preference shares held by the association and agrees that in the event of the company becoming able to pay a dividend on the preference shares issued by it such dividend shall in respect of any period prior to the date of this agreement be paid solely and exclusively on such of the preference shares as are held by persons other than the association. 2. The company hereby waives its claim against the association for payment of the said sum of £21,340 17s. 5d. and agrees that the association may retain and apply the same for the furtherance of the objects of the association in such manner as the association may in its absolute discretion deem fit."

Prior to 24th June 1952 at a meeting of second debenture holders, it was resolved that interest (if any) on second debentures issued by the ground company was cancelled, and prior to 22nd July 1952 at a meeting of first debenture holders, it was resolved that all accrued interest was cancelled. On 26th August 1952 the directors of the ground company made a declaration of solvency under the provisions of the *Companies Act*.

On 19th September 1952 at a meeting which purported to be a meeting of shareholders of the ground company, it was resolved " that the company be wound up voluntarily and that Mr. Charles James Foxall of Sydney, chartered accountant, be and is hereby

appointed liquidator for the purpose of such winding up . . . ". It was further resolved subject to the rights of holders of the outstanding first debentures and preference shares " that the liquidator be and is hereby authorized to divide *in specie* the assets of the company ".

In 1952, there were about 700 seats which were subject to the rights of special members.

On 18th December 1952 this suit was commenced by Archibald Howie and George Clifton Halliday by originating summons, and on 19th December 1952 upon the plaintiffs undertaking to commence a suit by statement of claim, such statement to be filed and served on or before 23rd January 1953, and upon the defendants without prejudice giving undertakings with regard to the plaintiffs and all persons registered as entitled to occupy " green chairs " in terms of the orders sought until the hearing of the suit, the originating summons was stood over until the hearing of the suit.

On 22nd January 1953 the plaintiffs filed a statement of claim. At that stage, all parties believed that the ground company had validly gone into liquidation. Shortly afterwards, the plaintiffs learned that the meeting of shareholders had not been validly called. It appears that the signatories to the memorandum of association of the ground company had not been entered in the share register and that notice of the meeting had not been sent to these shareholders.

On 23rd February 1953 the statement of claim was amended to meet the new circumstance and Mr. Foxall was made a defendant.

Mr. Foxall entered a submitting appearance and on 16th March 1953, the other two defendants filed their statement of defence.

On or about 8th May 1953 the president of the association prepared and circulated amongst councillors a report on the position as it then stood and on 26th May 1953 the council of the association resolved, " That by reason of the unavoidable internal expenditure and complications and the conflicts as to control arising from the continued existence of the two companies the vote of the association be cast at the forthcoming meeting of the ground company in favour of the liquidation of that company."

On 8th June 1953 a duly convened meeting of the shareholders of the ground company was held and the resolutions passed on 18th September 1952 were passed again.

On 21st August 1953 the defendant companies took out a summons for leave to amend the statement of defence to raise the new circumstances which had been brought about by the resolution to go

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into voluntary liquidation, and leave to amend was given as requested.

On 6th July 1954 the plaintiff Halliday entered a caveat against the title of the ground company's land at "White City" claiming an equitable estate or interest—"by virtue of the caveator's ownership of and right to the exclusive occupation in perpetuity of green seats Nos. 442 to 444 in the southern grandstand erected on the lands comprised in Certificate of Title volume 3728 folio 87 the said seats being attached to and forming part of the realty." He claimed his interest through Mr. R. C. Peoples as heretofore mentioned.

A transfer from the ground company to the association of the relevant land was lodged for registration and on 23rd July 1954 the Registrar-General forwarded to the plaintiff Halliday the usual notice. On 3rd August 1954 the plaintiff Halliday filed a motion for the extension of the caveat. By arrangement between the parties, without admissions, the caveat has been extended pending the determination of the suit.

The suit finally came on for hearing before *McLelland* J. on 9th August 1954. The relief sought by the plaintiffs in the statement of claim as finally amended was as follows:—"1. That it may be declared that the defendant New South Wales Lawn Tennis Ground Ltd. is not in liquidation. 1A. That it may be declared that the defendant New South Wales Lawn Tennis Ground Ltd. whether or not it is in liquidation holds the grounds of the White City, Rushcutter's Bay, subject to the rights of the plaintiffs to enter upon the said grounds and to use and occupy green chairs numbered 213 to 215 inclusive and 442 to 444 inclusive respectively in the southern stand of the said grounds. 2. That it may be declared that in the event of the defendant New South Wales Lawn Tennis Ground Ltd. at any time transferring or conveying the grounds of the White City, Rushcutter's Bay, to the defendant New South Wales Lawn Tennis Association Ltd. the defendant New South Wales Lawn Tennis Association Ltd. will hold the said grounds subject to the rights of the plaintiffs to enter upon the said grounds and to use and occupy green chairs numbered 213 to 215 inclusive and 442 to 444 inclusive respectively in the southern stand of the said grounds. 2A. That the defendant company its servants and agents may be restrained by entering into voluntary liquidation or by sale of the ground or otherwise from of its own motion putting an end to that state of circumstances under which the agreement entered into between it and the special members will continue to be operative. 2B. That the defendant New South Wales Lawn Tennis Ground Ltd. by itself its servants and agents may be

restrained from discontinuing its business. 2c. That it may be ordered that the defendant Charles James Foxall as liquidator of the defendant New South Wales Lawn Tennis Ground Ltd. apply *instanter* to the Court for an order staying all proceedings in relation to any winding-up of the defendant New South Wales Lawn Tennis Ground Ltd. and discharging him from such winding-up proceedings as liquidator to enable the defendant New South Wales Lawn Tennis Ground Ltd. to continue to carry on its business. 2D. That it may be ordered that all proceedings in relation to any winding up of the defendant New South Wales Lawn Tennis Ground Ltd. be stayed and that the defendant Charles James Foxall be discharged from such winding-up proceedings as liquidator of New South Wales Lawn Tennis Ground Ltd. 3. That the defendants and each of them by themselves their servants and agents may be restrained so long as the said grounds shall be used for the game of tennis from in any way interfering with the entry by the plaintiffs or either of them or by their respective legal personal representatives or by their respective nominees or assigns upon the said grounds of the White City for the purpose of using and occupying the said green chairs numbered as aforesaid in the southern stand of the said grounds or from using and occupying the said green chairs. 4. That the defendant New South Wales Lawn Tennis Ground Ltd. and the said Charles James Foxall by itself or himself its or his servants and agents may be restrained from conveying transferring dealing with or disposing of its assets otherwise than subject to the rights of the plaintiffs to enter upon the said grounds and to use and occupy the said green chairs numbered as aforesaid in the southern stand of the said grounds. 5. That the defendants or some one or more of them may be ordered to pay the plaintiffs' costs of this suit And for such further or other relief as the nature of the case may require."

McLelland J. dismissed the suit with costs, and thereupon the plaintiffs by special leave appealed to the High Court.

J. D. Holmes Q.C. (with him *A. F. Mason*), for the appellants. The circular should be construed against the background of the situation existing at the time of its issue. That situation and the document itself supports the conclusion that the rights and privileges of special membership are perpetual. The extent of the rights conferred by the circular is exhaustively delimited by the clause "Privilege of Special Members", which rights so given are without limit in point of time and are transferable and transmissible. The

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provision of the document relating to the change of ground is not inconsistent with the claim that the rights granted are perpetual. The proviso to such provision deals only with claims for compensation or damages at the suit of a special member and contemplates the continued existence of the special members' rights against the company because they are granted in perpetuity. There would be no point in providing against money claims if the proviso itself fixed a terminal point of the rights. No money claims could then arise. There is no right of termination in the ground company other than that expressly provided. The promise of the rights is unqualified by any reference to the continuance of the company's business, but the proviso precludes a money claim in the event of breach in certain events. The right granted is irrevocable and in particular the discontinuance of the business does not revoke it. If performance by the ground company is impossible the right continues as against the assignee association upon the principle of *Tulk* v. *Moxhay* (1) and *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.* (2). Alternatively, the rights of special members are to continue until the company's business is discontinued through one of the named causes otherwise than by the company's choice. The nominated causes contemplate a cause beyond the control or volition of the company. Apart from the question of the construction of the contract, assuming that the proviso to the change of ground provision does fix a terminal point of the rights effective at any discontinuance of the business there is an implied agreement that the company will not of its own choice discontinue its business. A party to a contract may not bring about the impossibility of its performance. [He referred to *Stirling* v. *Maitland* (3); *Southern Foundries* (1926) *Ltd.* v. *Shirlaw* (4); *Bank of New South Wales* v. *The Commonwealth* (5); *Hamlyn & Co.* v. *Wood & Co.* (6); *Rhodes* v. *Forwood* (7).]

[DIXON C.J. referred to *L. French & Co. Ltd.* v. *Leeston Shipping Co. Ltd* (8) and *Ogdens Ltd.* v. *Nelson* (9).]

The liquidation here was brought about by the company of its own making. No interest of the company could be promoted by the winding up other than the termination of the special members' rights and this was its only purpose. On either view of the construction of the contract the appellants' right to the relief sought

(1) (1848) 2 Ph. 774 [41 E.R. 1143].
(2) (1926) A.C. 108.
(3) (1865) 5 B. & S. 840 [122 E.R. 1043].
(4) (1940) A.C. 701, at p. 717.
(5) (1948) 76 C.L.R. 1, at pp. 281, 282.
(6) (1891) 2 Q.B. 488, at pp. 494, 495.
(7) (1876) 1 App. Cas. 256.
(8) (1922) 1 A.C. 451.
(9) (1905) A.C. 109.

has been established. On the last submission there is the implication of a negative covenant which would support an injunction against the ground company restraining it from distributing the asset in the ground otherwise than subject to the seat-holders' rights.

B. P. Macfarlan Q.C. (with him *F. J. D. Officer* and *M. L. Foster*), for the respondents. The decision under appeal is correct and for the reasons given. The trial judge found as a fact that the extinction of the special members' rights was simply one of the results which the association believed would follow the winding up and was not its purpose. The circular should be construed as a whole. To arrive at the nature and duration of the right conferred by special membership regard must be had to the change of ground provision along with the other clauses of the contract. The proviso to such provision relates not only to money claims but is intended to comprise everything that could be the subject of a right or claim against the ground company in the events stated including equitable remedies and rights to injunctions. The words " discontinuing its business " mean " ceasing to carry on its business " no matter what the reason. The rights created by the privileges of special membership clauses continue throughout the period of the ground company's operations and the change of ground provision sets the terminal point to that. The first portion of such provision makes it plain that the right ceases if the ground is sold, and an entirely different obligation arises in the ground company to see if it can obtain similar rights for the seat-holders. Sale, too, may be a voluntary act on the part of the company and the point of cessation is then the sale. Nothing in the change of ground provision limits winding up to compulsory winding up, and the appellants acknowledge that the clause may operate in certain circumstances when the winding up is voluntary, as where directors undertake the winding up to avoid rendering the company more insolvent by continuing its business. To give the clause this gloss is in reality to seek to imply a term which by reason of its very vagueness the law will not imply, for it would be equally valid to say that the clause could apply to a winding up where the company's business was uneconomical as opposed to verging on insolvency. The necessity of implying a term itself defines the term to be implied and that cannot be done here if the limited construction sought by the appellants is to prevail. Similarly the word " sale " cannot be limited to other than a voluntary sale. In both instances the argument in favour of implication founders on the rule that what is implied cannot contradict what is express,

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and that would here be the case. [He referred to *Peters American Delicacy Co. Ltd.* v. *Champion* (1); *Hamlyn & Co.* v. *Wood & Co.* (2); *Heimann* v. *The Commonwealth* (3).] Nothing said in *Stirling* v. *Maitland* (4); *Southern Foundries* (1926) *Ltd.* v. *Shirlaw* (5) or *Carrier Australasia Ltd.* v. *Hunt* (6) was intended to cut down or operate contrary to the agreement of the parties, unless some positive rule of law was infringed. [He referred to *Southern Foundries* (1926) *Ltd.* v. *Shirlaw* (7).]

It must be a question in every case of the construction of the particular agreement and what part the existence of that purpose will play must depend upon the provisions of the agreement. To take an extreme case, there would be no objection if the parties expressly agreed. [He referred to *L. French & Co. Ltd.* v. *Leeston Shipping Co. Ltd.* (8); *Creamoata Ltd.* v. *Rice Equalization Association Ltd.* (9); *Ogdens Ltd.* v. *Nelson* (10); *Bank of New South Wales* v. *The Commonwealth* (11); *Rhodes* v. *Forwood* (12); *Reigate* v. *Union Manufacturing Co.* (13).] There can be no implication cutting down the clear words of an agreement unless it is plainly necessary for some purpose of the contract to make the implication. The circular creates a contractural right in the special members to enter the grounds and view tennis from allotted seats. The authorities are conclusive that such a right is not binding on an assignee. [He referred to *De Mattos* v. *Gibson* (14); *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.* (15); *King* v. *Allen (David) & Sons, Billposting, Ltd.* (16); *Clore* v. *Theatrical Properties Ltd.* (17).] Views different from those expressed in the two cases lastly mentioned have been taken in *Thompson* v. *Earthy* (18); *Errington* v. *Errington* (19); *Bendall* v. *McWhirter* (20); *Bradley-Hole* v. *Cusen* (21); *Jess B. Woodcock & Son, Ltd.* v. *Hobbs* (22). There are also discussions of these cases in articles by *H. W. R. Wade* (23); *R. E.*

(1) (1928) 41 C.L.R. 316, at pp. 324, 325.
(2) (1891) 2 Q.B. 488.
(3) (1938) 38 S.R. (N.S.W.) 691; 55 W.N. 235.
(4) (1865) 5 B. & S. 840 [122 E.R. 1043].
(5) (1940) A.C. 701.
(6) (1939) 61 C.L.R. 534.
(7) (1940) A.C., at pp. 713, 714, 720.
(8) (1922) 1 A.C. 451, at p. 454.
(9) (1953) 89 C.L.R. 286, at p. 316.
(10) (1905) A.C. 109, at p. 114.
(11) (1948) 76 C.L.R. 1, at pp. 281, 282.
(12) (1876) 1 App. Cas. 256, at pp. 263, 268, 271, 272.
(13) (1918) 1 K.B. 592, at pp. 600, 604, 605.
(14) (1858) 4 De G. & J. 276, at p. 281 [45 E.R. 108, at p. 110].
(15) (1926) A.C. 108, at pp. 116, 117, 118, 119.
(16) (1916) 2 A.C. 54, at pp. 61, 62.
(17) (1936) 3 All E.R. 483, at pp. 490, 491.
(18) (1951) 2 K.B. 596.
(19) (1952) 1 K.B. 290.
(20) (1952) 2 Q.B. 466.
(21) (1953) 1 Q.B. 300.
(22) (1955) 1 All E.R. 445; 1 W.L.R. 152.
(23) (1952) 68 L.Q.R. 337.

Megarry (1); *G. C. Cheshire* (2). [He referred to *Brennan* v. *Thomas* (3).] The appeals should be dismissed.

J. D. Holmes Q.C., in reply.

Cur. adv. vult.

THE COURT delivered the following written judgment:

This is an appeal by special leave from a decree of the Supreme Court of New South Wales (*McLelland* J.) dismissing a suit in equity. The case is of an unusual character, and presents difficulties. Each of the plaintiffs claimed, and sought to enforce, a right to have certain seating accommodation exclusively reserved for him in the grandstand on a lawn tennis ground in Sydney, known as the "White City", the freehold of which is owned by the first-named defendant company. The facts are stated in full detail in the judgment of *McLelland* J. For present purposes, it will suffice to state them in somewhat more summary form.

Before 1920 the control of the game of lawn tennis in New South Wales was in the hands of a body known as the New South Wales Lawn Tennis Association Ltd., which had been incorporated under the *Companies Acts* in 1907 or 1908. This company owned and managed lawn tennis courts at Double Bay. In 1920 an opportunity arose of acquiring for the purposes of lawn tennis an area of land formerly used as an amusement park known as the White City. In order that this purchase might be effected, the existing company was wound up, and two new companies were formed. The one was incorporated under the same name—New South Wales Lawn Tennis Association Ltd.—and it will be convenient to refer to it as "the association". The other was incorporated under the name of New South Wales Lawn Tennis Ground Ltd., and it will be convenient to refer to it as "the ground company". The ground company was incorporated on 26th September 1921, and the association on 6th October 1921. These two companies are the defendant companies. The primary object of the ground company was to acquire, maintain and manage, tennis courts, while that of the association was to control the game of lawn tennis in New South Wales. The relations between the two bodies were governed by an agreement made on 7th October 1921, to which the liquidator of the old association was a party. The courts at Double Bay were sold, and the ground company in due course became, and it still is, the owner of the White City property.

(1) (1955) 71 L.Q.R. 175.
(2) (1953) 16 Mod. L.R. 1.
(3) (1953) V.L.R. 111.

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The nominal capital of the ground company was £15,000 divided into 5,000 fixed cumulative eight per cent preference shares of one pound and 10,000 ordinary shares of one pound. Article 4 of the company's articles provided that the ordinary shares should be available for allotment only to the association. In fact 4,987 preference shares were issued to various holders, and 5,440 ordinary shares were issued to the association. There was also an issue of first debentures to the value of £30,000, and an issue of second debentures to the value of £14,000. No dividend was ever paid on the preference shares, and there was only one payment of debenture interest.

The moneys raised by the issue of shares and debentures were, of course, required for the purchase of the White City property, the construction of tennis courts, the erection of a club-house and the provision of seating accommodation for spectators. Within two years of its incorporation the ground company was in financial difficulties. Its directors were of opinion that greatly increased revenue could be obtained if a new grandstand were erected, and one of them, Mr. M. H. Marsh, conceived the idea that finance for such a stand could be obtained by offering for £100 three seats " in perpetuity " in the stand to be erected. A " grandstand committee " was constituted, and in the minutes of that body of 21st September 1923 appears the following: " It was decided that, to finance the erection of a grandstand, a certain number of seats be sold, which were to be held in perpetuity by the buyers, subject to special provisions in the event of any unforeseen circumstances . . . It was decided that three seats be sold for £100." Shortly thereafter the scheme was approved by the directors of the ground company, and a circular, accompanied by an application form, was forwarded to persons likely to be interested. This circular is the central element in the case, and it is desirable to set out a considerable part of it.

The document is headed :—" N.S.W. Lawn Tennis Ground Ltd. —Circular showing conditions for special membership of the company's ground ". It states the company's intention to proceed with the construction of the new grandstand " as soon as the required number of formal applications for special membership as hereinafter defined have been received by the company." It proceeds: "A central section of the grandstand will be provided with special seating accommodation, and will be exclusively reserved for bearers of special membership tickets, Vice-regal parties, and special guests of the company ". Under the heading " Privileges of Special Members " it is stated that a person who is accepted by

the company as a special member will be entitled (1) to three tickets entitling each member (a) to free admittance to the ground, (b) to all the rights of a non-playing member on the ground except the right to use the club-house, (c) to the occupation of a particular seat in the reserved section of the grandstand to be allocated by the directors . . . (3) to transfer the said tickets or any of them and all rights appurtenant thereto to any persons by notice in writing to the company, whereupon the transferee shall step into the shoes of the special member as regards the transferred ticket or tickets: (4) upon his death, and upon notice in writing to the company, to have his legal personal representatives, or any person or persons nominated by them in writing, recognized and enrolled as special members in his stead with the same rights which he would have possessed if alive. The company is to keep a register of all special members, entering therein from time to time the names and addresses of all special members, and recording all transfers and transmissions. Under the heading " Obligations of Special Membership ", it is stated that all special members and the bearers of their tickets are to be bound by the regulations and by-laws of the company, and that, in the event of any breach of any regulation or by-law or other misconduct, the special membership may be suspended or, after the member has been heard by a special meeting of directors, terminated. Then follows a clause which was the subject of much argument. It is headed: " Provision in the event of change of ground ", and it is in the following terms:—" In the event of the company at any time acquiring a new ground in lieu of the present ground the company will as soon as practicable obtain for its special members then enrolled, rights on the new ground as similar as possible to the rights which they are to enjoy on the present ground in accordance with this circular, but except as herein provided a special member shall have no rights against the company whether by way of compensation damages or otherwise in the event of the company discontinuing its business through winding up sale or any other cause whatsoever ".

The application form, which accompanied the circular, requested the company to enrol the applicant as a special member and to allot to him or her tickets " upon and subject to the terms of the circular ". Each of the appellants is a successor in title of a person who signed an application form in these terms, paid the required sum, and was entered on the register of special members. It is admitted by the respondents that each of the appellants is entitled to whatever rights (if any) his predecessor would have had in the events which have happened.

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It would appear that about 700 persons applied for special membership and were enrolled as special members. With moneys wholly or principally obtained from the moneys paid by these persons for special membership the grandstand, which is known as the southern stand, was in due course erected. Special seats were appropriated to " special members ", particular seats being allocated to each such " member ". The seats of special members appear also to have been painted a distinctive colour, and the rights claimed by the plaintiffs are referred to in the amended statement of claim as rights to occupy " green chairs " having specified numbers. Each such seat was divided from the one adjoining, and was individually numbered. A register was kept of special members and of the seats allocated to each of them, and every special member was given a metal ticket for each of his seats bearing the number of the seat.

The ground company continued to be in financial difficulties, and an involved and generally unsatisfactory position arose by reason of this fact and of the fact that serious differences occurred from time to time between the ground company and the association with regard to the use of the ground and other matters. Before the war steps had been considered, and legal advice had been taken, with a view to creating a more satisfactory position, and even at this stage it seems to have been considered that the only satisfactory solution lay in the acquisition by the association of the assets of the ground company. It was not, however, until after the war that practical steps were taken on an opinion obtained from counsel in 1948. By 27th May 1952 certain first debentures and preference shares had been forfeited, presumably because they had not been paid in full, and the association had acquired, and held on that date, all the first debentures of the ground company except £100, all the second debentures, and all the preference shares except fifty. It had, of course, held from the beginning all the ordinary shares. The association then, by steps which need not be detailed, released the ground company from liability to pay arrears of dividend on the preference shares held by it and from liability for interest on the second debentures. At a meeting of holders of first debentures a resolution was passed that the ground company's liability for interest on the first debentures should be cancelled. Then at a meeting of shareholders of the ground company, held on 19th September 1952, it was resolved that the company be wound up voluntarily, and that Mr. C. J. Foxall (who is one of the respondent-defendants) be appointed liquidator. It was further resolved (subject to satisfaction of the rights of the holders of the outstanding

first debentures and preference shares) " that the liquidator be and he is hereby authorised to divide *in specie* the assets of the company ". This meant, of course, a transfer of the assets of the ground company to the association. In fact a transfer of the land (which is under the *Real Property Act* 1900) was subsequently executed and lodged for registration, but registration is held up by a caveat lodged by the second-named appellant. The appellants' suit was commenced on 18th December 1952. It may be mentioned that complications arose by reason of the discovery, after the commencement of this suit, that the meeting of 19th September 1952 had not been duly convened. It is sufficient to say that the resolution then passed was passed again at a duly convened meeting on 8th June 1953, and that the suit proceeded on the basis that a formally valid resolution for winding up and distribution *in specie* had been passed by the shareholders of the ground company.

The plaintiffs' claim, as has been seen, is not for damages. They seek exclusively equitable relief by way of declarations and injunctions, the substance of which may be stated shortly. They claim, in the first place, declarations (1) that the ground company holds the White City property subject to the rights of the plaintiffs to enter on the ground and to use and occupy the green chairs allocated to them respectively, and (2) that, if the White City property is conveyed or transferred to the association, the association will hold it subject to the said respective rights of the plaintiffs. They also claim a general injunction against both companies restraining them from in any way interfering with the entry by the plaintiffs on the ground for the purpose of using or occupying their green chairs, or with their using or occupying those green chairs. So far, relief is claimed on the footing that there is no legal objection to the transaction which is in progress, but that its carrying out will not affect the rights of the plaintiffs in respect of their green chairs. The defendants, of course, accept the first of these propositions, but deny the second. The rest of the relief claimed is claimed on the alternative footing that the transaction which is in progress will, if completed, have the effect of destroying the plaintiffs' rights in respect of their green chairs. On this footing the plaintiffs seek to prevent the transaction from being carried out at all, or to prevent it from being carried out otherwise than subject to the protection of their rights in respect of their green chairs. Accordingly they claim (1) an order staying the winding up of the ground company and an injunction restraining that company from entering into voluntary liquidation, from discontinuing its business, and from transferring its assets to the association, or (2) alternatively an

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injunction restraining the ground company from doing any of these things otherwise than subject to protection of the rights of the plaintiffs in respect of their green chairs. This statement of the relief claimed does not reproduce the terms of the prayer of the statement of claim, but it does, we think, represent a logical analysis of that prayer and of the alternative bases on which it is founded.

Before proceeding further it is desirable to obtain as clear an idea as possible of the nature of the contract which is the ultimate basis of the plaintiffs' claims. It is clear that a contract was made between the ground company and each of the allottees of green chairs, and it has not been disputed that the contract was one for breach of which an injunction would be an appropriate remedy. The express terms of the contract are to be found in the circular, and we think that *McLelland* J. was right in holding that they are to be found exclusively in the circular. It is apparent, however, that a number of implications must of necessity be made. So far as the seat-holder is concerned, when he has paid his £100, the contract may be regarded as completely executed on his part, though he remains bound, when he enters the ground, to observe the regulations and by-laws of the company. The ground company may or may not have been under an enforceable obligation to erect a grandstand when it had received a certain number of applications, but, if it did erect a grandstand—and it did in fact do so—it was under an obligation to include therein a central section containing three special identifiable seats for each special member. It was also, we would think, bound to maintain the green chairs in reasonably usable condition. Having provided the green chairs, it was bound (a) to permit each special member to enter the ground free of charge and to occupy by himself or his friends his three green chairs, (b) not to permit any other person to occupy any of those chairs. But we would certainly not take this to mean that any special member was entitled to enter the ground and occupy a green seat at any hour of any day or night, and for any period, however long. The contract must be construed reasonably in the light of its main purpose, and we would think it clear that the special member's right was at most a right to enter and occupy green chairs for the purpose of watching the playing of lawn tennis —or perhaps any other game or spectacle that might be played or produced there. We would also think it clear that the ground company was under no obligation to arrange for tennis competitions or exhibitions on the ground or otherwise for the playing of tennis or any other game or for the provision of any other spectacle on the ground. The company cannot be regarded as saying more than :

" If and when we procure or allow tennis to be played, or any other game or spectacle to be played or produced, on our ground, you may enter the ground and use your green chairs and watch the entertainment ". It seems to us impossible to imply any term to the effect that the company will provide spectacles for the special member to watch. There was in fact in existence an agreement between the ground company and the association that the association would not play matches or tournaments promoted by it on any ground other than the White City ground, and the association was the de facto controller and organizer of the playing of lawn tennis in New South Wales. It was no doubt anticipated that this agreement would continue and would be observed. But we would think it difficult to maintain that the ground company would have committed a breach of an implied term of its contracts with special members if, consulting its own interests or the interests of tennis players generally, it had released the association from its obligations under this agreement or had agreed that some other ground should be substituted for the White City ground. These considerations suggest a degree of analogy between the present case and the cases of *Rhodes* v. *Forwood* (1) and *Hamlyn & Co.* v. *Wood & Co.* (2), and suggest that, even in the absence of that clause in the circular which is headed " Provision in the event of change of ground ", the appellants might have been in difficulties. It is unnecessary, however, to pursue this matter further, because we think that *McLelland* J. was right in holding that that clause excludes the appellants from the remedies which they seek against the ground company as for breach of contract.

It may be thought that, as a matter of drafting, the clause in question is open to criticism. The use of the word " obtain " is curious, because, in the event supposed, the company would itself be in a position to grant the equivalent rights to the special members: it would not be a matter of procuring them to be granted by some other person. But there is no doubt, we think, about the meaning, and there is no serious difficulty in reading the words " obtain for its special members rights on the new ground " as meaning " take all necessary steps to see that rights on the new ground are secured to special members ". The words " except as herein provided " can only refer to the earlier part of the clause, and must mean " apart from the special right expressly given by this clause ". The general purport of the clause is thus, we think, seen to be (1) to give to the special member a special right in an event which would

(1) (1876) 1 App. Cas. 256. (2) (1891) 2 Q.B. 488.

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or might otherwise render his privileges ineffective, and (2) to provide that in no other event of that nature is he to have any enforceable right against the company.

It was suggested that the words " whether by way of compensation, damages or otherwise " should be read as excluding only legal remedies resulting in a payment of money and not equitable remedies such as an injunction. We can see no justification for so limiting the words " or otherwise ", and it seems to attribute a very remarkable intention to the parties if we regard them as meaning to exclude only particular remedies. The clause is in terms dealing with rights and not merely with remedies, and the clear purpose seems to be to exclude all rights enforceable by action for damages or in any other way.

Then it was sought to limit the concluding words of the clause in one of two ways. The event in respect of which the clause protects the company is its discontinuing of its business through winding up, sale, or any other cause whatsoever. Again the language of the clause is somewhat curious: the preposition " through " is used somewhat unnaturally. But again the meaning does not seem in doubt. First, it was said that the clause applied only where the event was brought about by causes beyond the control of the company itself, as by a compulsory winding up or a sale by a mortgagee. It did not apply, it was said, where the event was brought about by the voluntary act of the company itself. It might possibly have been answered that the winding up here was, in substance though not in form, a creditors' winding up. But, however this may be, again we can see no reason for limiting in the manner suggested the literal meaning of the words used, and we think that affirmative reasons for giving them their literal meaning exist. The active voice is used, and in their most natural meaning the words " in the event of the company discontinuing its business " refer primarily to a voluntary act of the company itself, though they are, of course, apt to include the case where a discontinuance is forced on the company. Again, it is extremely difficult to regard the word " sale " as limited to a sale by some person other than the company itself: the word itself suggests an act of the company itself. Then the words " or any other cause whatsoever " are very wide: they include prima facie *any* cause, whether it be a voluntary act or something to which the company is forced to submit. Again the literal meaning fits in very much better with the first part of the clause, which is protective of the special member. The clause, as a whole, then means that, so long as the company continues its business of staging sporting spectacles, whether on the White City

ground or on some other ground, the rights of the special member are preserved, but, if and when it ceases for any reason to carry on that business, the rights of special members are to cease. Finally, the meaning for which the respondents contend seems much the more reasonable meaning. It might well be envisaged as a possibility that the company's business would be carried on at a loss, and that an advantageous offer to buy the property for a factory site or for some other purpose would be received. It would not seem very reasonable that a single special member should be able to compel the company to carry on until it was forced into liquidation, by which time the offer might no longer be available. The construction for which the appellants contend hangs, we think, in the last analysis on a connotation attributed to the word " through ", which is perhaps more appropriate to an event in which the company is passive than to an event in which it is active. But the preposition cannot, in our opinion, carry the weight attributed to it. There are too many countervailing considerations. The word, in our opinion, means no more than " as a result of ".

The other limitation for which the appellants contended was this. They said that the latter part of the clause did not protect the company if it went into voluntary liquidation, or sold the White City property of its own motion. This meant something less than an implication that a liquidation would be a breach if it would not have been resolved upon but for the actual purpose of evading or escaping from its obligations to special members. With regard to the purpose of what was done, *McLelland* J. has found that it was not done in order to defeat the rights of the special members. This finding is not, in our opinion, open to challenge. We think it is fully supported by the evidence. We do not think that the transaction was occasioned by the existence of the rights of special members. They were regarded as merely incidental. The transaction was occasioned, we think, by the desire of the association, in what it conceived to be the interests of lawn tennis players and the lawn tennis public generally, to eliminate the ground company as a separate entity. It seems to have been believed either that the special members had in any case no legally enforceable rights, or that they would have no legal rights if the transaction were carried out. But we do not think that the exclusion of the rights of special members was in any real sense an object of the transaction. *McLelland* J. said :—" The proper inference to be drawn from the facts is, I think, that those who controlled the association believed that the special members had no legal rights which needed to be considered in connection with the taking over of the assets by the

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association, although it was recognized that special members had moral rights." The reference to " moral rights " is a reference to the fact that the association did not actually propose to rest strictly upon its view that special members' rights were legally either non-existent or extinguished. It was prepared to concede certain modified rights for the future to special members. As to the lesser implication, that the company would not resolve upon a voluntary liquidation of its own motion, whatever its exact extent, it is enough to say that it is quite unwarranted by the terms and character of the transaction.

The view which we have expressed of the effect of the " Provision in the event of change of ground " was, we think, rightly regarded by *McLelland* J. as fatal to the whole of the plaintiffs' claim. It might be suggested that it is not *ex facie* necessarily inconsistent with the argument of the plaintiffs that the association, as an assignee with notice, must take the White City property subject to the rights of special members. But the construction which *McLelland* J. adopted, and which we think is correct, really means, as it seems to us, that the assignment brings the contract to an end to all intents and purposes. The plaintiffs could, in our opinion, only succeed on the view that there was in the contract an implied term, the benefit of which was preserved, or at least not taken away, by the " provision in the event of change of ground ".

We would not think, in any case, that the plaintiffs could succeed in laying the burden of the contract on an assignee with notice. Mr. *Holmes* said that he relied on *Tulk* v. *Moxhay* (1). But the doctrine of *Tulk* v. *Moxhay* (1) is limited to negative covenants, and to covenants made for the benefit of land of the covenantee: *London County Council* v. *Allen* (2). The latter limitation of the doctrine appears to have been recognized in *Lord Strathcona Steamship Co. Ltd.* v. *Dominion Coal Co. Ltd.* (3), though one would have thought, with respect, that, apart from any other consideration, its recognition would have been fatal to the plaintiff in that case. That was a case of a sale of a chartered ship. This is a case of a conveyance of land, and, whatever may be the position with regard to chattels, the doctrine of *Tulk* v. *Moxhay* (1) cannot, consistently with *London County Council* v. *Allen* (2), be applied to it. Some colour for a contention that the contract in this case created equitable interests in land may be thought to be lent by certain very recent decisions and dicta in England, but, in our opinion, it would be inconsistent with long established authority to hold that such

(1) (1848) 2 Ph. 774 [41 E.R. 1143].
(2) (1914) 3 K.B. 642.
(3) (1926) A.C. 108, at p. 121.

a contract as that with which we are concerned here was binding in equity on a purchaser with notice. It need only be added that, if the contract were regarded as conferring equitable interests in land, the application to it of the rule against perpetuities would have to be considered.

The appeal should, in our opinion, be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Clayton, Utz & Co.*

Solicitor for the respondents, *W. J. Southey Wilson*, by *Michell, Gee, Wilson & Clapin.*

R. A. H.